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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-453

LEWIS H. SWORD, *et al.*,

Petitioners,

—v.—

JAMES W. FOX, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

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The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on July 1, 1971, reversing a decision of the United States District Court for the Western District of Virginia which had granted petitioners' Motion for Summary Judgment.

Citation to Opinion Below

The opinion of the United States Court of Appeals is as yet unreported; it is set forth in the Appendix, *infra,* at pp. 1a-18a. The opinion of the United States District Court is reported at 317 F. Supp. 1055, and is set out in the Appendix, *infra,* pp. 21a-48a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 1, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

(1) Whether the rules of a state college regulating freedom of expression must conform to normal First Amendment standards?

(2) Whether, under such standards, the petitioners' activities could be prohibited?

(3) Whether a college's absolute prohibition on "demonstrations . . . inside any buildings" is defectively overbroad?

(4) Whether the college's system of regulating expression is so vague as to confer unbridled discretion upon college officials to prohibit or summarily punish protected First Amendment activity?

Statement of the Case

The petitioners, students at Madison College, a state-run institution in Harrisonburg, Virginia, brought this suit as a class action on behalf of all such students. The suit challenged the validity of the college's "Regulations on Demonstrations and Peaceful Assembly," pursuant to which certain of the petitioners had been subjected to disciplinary procedures.[1]

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[1] Those regulations were appended to the District Court opinion and are set out in the Appendix, *infra*, pp. 45a-48a.

The events out of which the lawsuit arose were as follows:

In April 1970 a controversy developed at the campus stemming from the college's decision not to retain certain teachers. App., *infra,* pp. 3a, 25a. On Thursday, April 23rd a meeting and a rally, in conformity with college regulations, were held to protest these decisions. Following the meeting a group of approximately 25 people proceeded to Wilson Hall, a combination administration, classroom and auditorium building which was customarily open day and night, and assembled there at approximately 11:00 P.M. App., *infra,* pp. 3a-4a, 25a-26a. Their intention was to maintain a vigil overnight to dramatize their views and to speak with President Miller the following morning. App., *infra,* pp. 3a-4a, 25a-26a. Two or three of the students had sleeping bags, the rest sat on benches in the lobby or on the floor. As the District Court found, "the passages were kept clear, and there was no boisterousness. Most sat and talked, and a few had brought something to read." App., *infra,* p. 25a. At approximately 12:35 A.M., Dean Fox arrived and informed the group that they were conducting an unregistered demonstration in violation of the Regulations and would be subject to sanctions unless they left. Most of the group quietly complied. The Dean returned within the hour, informed the remaining students that a violation of the Regulations had occurred and photographed the participants. A few minutes later the rest of the group left.

The next day, Friday, April 24th, a number of students sought permission to conduct a vigil in Wilson Hall 48 hours later. App., *infra,* pp. 4a, 26a. Permission was denied by Dean Fox on the ground that it would constitute

"a demonstration inside a building," impermissible under the Regulations. App., *infra,* pp. 4a, 26a.

Nevertheless, on Sunday evening a group of students and faculty members again assembled in the lobby of Wilson Hall, planning another overnight vigil following which they intended to speak with President Miller in the morning. App., *infra,* pp. 4a, 26a-27a. A few moments later, college officials arrived, as did campus police who began locking the doors. App., *infra,* p. 27a. Warnings were issued and some people left, though others remained. The group was orderly and some sang songs. App., *infra,* p. 27a. A second warning was issued, informing the students that they were now subject to summary suspension. About midnight, local police arrived and arrested approximately thirty people. There was no resistance and in fact the students swept up the area before leaving.[2]

The District Court summarized the students' conduct in the following fashion:

> Here on both occasions the students in Wilson Hall displayed exemplary orderliness. They were courteous toward administration representatives and toward the police who appeared on Sunday night. They did not break into the premises; indeed the evidence is that they went to Wilson on Thursday partly because they knew it was left open night and day. Their principal purpose was to meet with President Miller in the morning, having waited overnight to dramatize their concern. Nothing in the file indicates that the students intended anything but a calm discussion with the presi-

[2] A number of students were prosecuted under the state trespass law. Appeals from their convictions are pending. App., *infra,* p. 4a, N. 4.

dent. No property damage occurred, and there is positive evidence to the effect that the occupants took pains to be neat. No one was excluded from entering the lobby or using it for access to other rooms. App., *infra,* pp. 42a-43a.

The only reason for the ensuing disciplinary action, which ranged from reprimands to indefinite suspensions, was that the petitioners had violated the college's Regulations. The relevant portions of the Regulations are as follows:

> A demonstration is considered to be a public manifestation of welcome, approval, protest or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)
>
> • • • • •
>
> 1. The demonstration is to be registered with the Office of Student Activities 48 hours in advance.
>
> • • • • •
>
> 4. Demonstrations are forbidden in the areas of the Health Center, inside any buildings and congregating in the locations of fire hydrants. The appropriate areas for demonstrations will be determined at the time of the request.
>
> • • • • •
>
> When an assembly of students not authorized by the Dean of Student Services, the Dean of Men, or the Dean of Women has been requested to disband by the President or by an officer of the Student Government Organization or Student Government Association, or by a dean or other administrative officer,

those students refusing to comply will be subject to immediate suspension. App., *infra,* pp. 45a-48a.

The petitioners brought suit to challenge these provisions. District Judge Merhige, after hearing evidence on a motion for a preliminary injunction and studying the pleadings and exhibits, granted the petitioners' motion for summary judgment declaring that the above-quoted portions of the Regulations were unconstitutional. App., *infra,* pp. 19a-20a.[3] The District Court held (1) that college regulations governing freedom of expression must be scrutinized by normal First Amendment doctrines, (2) that the Regulations' definition of "demonstration" is unconstitutionally vague, thus allowing unfettered administrative discretion to withhold approval and to impose summary punishment, (3) that the Regulations' ban on "demonstrations . . . inside any buildings" is overbroad and not precisely aimed at advancing legitimate state interests, (4) that the 48 hour registration rule improperly bars spontaneous dissent and (5) that the petitioners' activity was constitutionally protected.

The respondents appealed this ruling, and the Court of Appeals reversed. That Court held that the petitioners had standing to challenge only the prohibition of demonstrations inside buildings as applied to their "sit-in." App., *infra,* p. 7a. The Court further held that college rules regulating freedom of expression were to be judged by the standard of "reasonableness," App., *infra,* pp. 12a-14a. So judged, the prohibition on any demonstrations in a building was upheld:

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[3] The motion for a preliminary injunction to restrain college disciplinary proceedings was denied. The District Court thereafter ruled on the motion for summary judgment, App., *infra,* pp. 24a-25a.

> . . . the regulation proscribing the use of college buildings for demonstrations, especially as applied to the particular building involved here, is a valid and reasonable exercise of the authority of the college to promulgate and enforce rules and regulations and does not represent an unreasonable limitation upon the First Amendment rights of the appellees and the class they represent. App., *infra*, pp. 15a-16a.

Finally, the Court of Appeals concluded that the Regulations were neither vague nor overbroad.

It is to review that decision that petitioners seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. College regulations which infringe freedom of expression must be tested by general First Amendment standards.

In invalidating portions of the Regulations on demonstrations, the District Court applied those normally strict First Amendment doctrines—both substantive and "procedural"[4]—which this Court has developed. The Court of Appeals upheld those Regulations on the basis of a watered-down reasonableness test:

> Specifically, the test for the reasonableness of college regulations is whether such regulations "measurably contribute(s) to the maintenance of order and decorum within the educational system", are calculated to pre-

[4] See generally, Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970); Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970).

> vent interference with "'the normal activities of the University'" or obstruction to its function "to impart learning and to advance the boundaries of knowledge", or are important in maintaining "order" and "normal operation". App., *infra*, p. 10a (footnotes omitted).

This disagreement over the proper analytic framework from which to determine the First Amendment rights of college and university students is symptomatic of the confusion and disarray which obtains not only among the Circuits, compare, *Brooks* v. *Auburn University*, 412 F.2d 1171 (5th Cir. 1969) and *Soglin* v. *Kauffman*, 418 F.2d 163 (7th Cir. 1969), with *Esteban* v. *Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969); *cert denied*, 398 U.S. 965 (1970) and *Healy* v. *James*, —— F.2d ——, 40 Law Week 2071 (2d Cir. 1971); *pet. for cert. filed*, —— U.S. Law Week —— but also within them, compare the decision below with *Saunders* v. *Virginia Polytechnic Institute*, 417 F.2d 1127 (4th Cir. 1969).

It has been almost four decades since this Court last considered the First Amendment rights of college students.[5] To be sure, this Court's decision in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) has provided substantial guidance in determining the proper scope of First Amendment rights for secondary school students. But further guidance is needed. There are crucial distinctions between the college environment and the high school environment. Cf., *Tilton* v. *Richardson*, 29 L. Ed. 2d 790, 803 (1971) (noting that college students

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[5] In *Hamilton* v. *Board of Regents of the University of California*, 293 U.S. 245 (1934) this Court relegated college students virtually to the complete discretion of college administrators and their "academic judgments." Of course, the conceptual underpinnings of *Hamilton* have been greatly eroded. See *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506, N. 2 (1969).

are more skeptical and less impressionable than their younger counterparts and thus less susceptible to religious indoctrination). Not only are college students older and more mature, but by virtue of the Twenty-Sixth Amendment, almost every college student is now fully enfranchised and entitled to participate in the political process.

Accordingly, the petitioners submit, and the District Court agreed, that because of their maturity and in light of their recent inclusion in the political process, college students are entitled to the identical First Amendment protections on the campus as they or any other citizens would have in the community at large. Had the Court of Appeals agreed, it would have invalidated the Regulations for the reasons set forth *infra*. It is the failure to afford full protection for freedom of expression on the campus which requires that certiorari be granted.[6]

2. A college's absolute ban on "demonstrations . . . inside any building" is constitutionally overbroad.

Apart from the general invalidity of the Regulations' licensing scheme, see Point 3, *infra*, its central feature is the absolute prohibition of any demonstration inside a building. The court below upheld this rule on the ground that "college buildings are *generally* dedicated to classrooms, administrative offices, libraries, health centers and dormitories." App., *infra*, p. 11a (emphasis added). However, decisions have made it clear that First Amendment activities of the kind involved here cannot be banned simply because

[6] This Court has also noted jurisdiction in *Board of Regents of the University of Texas System* v. *New Left Education Project*, No. 70-55, a case which raises analytically similar questions concerning the application of traditional First Amendment doctrines in the college setting.

they take place within a building. See *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2nd Cir.), *cert. denied*, 393 U.S. 940 (1968); cf., *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Davis* v. *Francois*, 395 F.2d 730 (5th Cir. 1968). Accordingly, the prohibition is classically overbroad, simultaneously prohibiting activities which can be prosecuted and those which cannot. See, e.g., *Keyishian* v. *Board of Regents*, 385 U.S. 559 (1967).[7]

To be sure, there are valid governmental interests which could be asserted with regard to demonstrations inside buildings. As the Fifth Circuit noted in striking down a flat prohibition on demonstrations, "these interests are the prevention of riots, disorders, interference with traffic, blockage of sidewalks or entrances to buildings, and disruption of the normal functions of the public facility." *Davis* v. *Francois, supra*, at 733. The regulation at bar, however, is not aimed at achieving comparably narrow goals. The very fact that the Regulation was applied here —even though there was no disruption of academic or administrative activities, no disturbance of other students, no interference with traffic—bespeaks its improper sweep. Similarly, the state may not use its recognized authority to regulate the time, place or manner of First Amendment conduct as a method to prevent such conduct completely.

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[7] The Fourth Circuit seemed to indicate that the petitioners could challenge the prohibition only as applied to sit-ins. App., *infra*, pp. 5a-7a. Even assuming, *arguendo*, that sit-ins could validly be banned, but see point 4 *infra*, the Regulations still encompassed activities which could not be prohibited, such as a silent vigil. See *Brown* v. *Louisiana, supra*. Thus, even if petitioners' conduct was arguably unprotected, they nevertheless have standing to challenge the Regulations. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *The Corporation of Haverford College* v. *Reeher*, —— F. Supp. ——, 40 Law Week 2087 (E.D. Pa. 1971) (3 Judge court); see generally, Note, *The First Amendment Overbreadth Doctrine, supra*.

See *Wolin* v. *Port of New York Authority, supra; Davis* v. *Francois, supra.* If a college can demonstrate valid interests in banning demonstrations within dormitories, for example, or limiting such demonstrations in terms of the time when they may occur, then the Regulations should be drawn so as to accomplish such objectives. But, "unless the building is a sensitive facility that may be made totally off limits to public debate, the right to demonstrate on public property should only be regulated by statutes that consider all of the nuances of time, peace and manner." *Davis* v. *Francois, supra,* at 736 (footnotes omitted). Here, no such nuances are considered: the ban, for First Amendment purposes, is complete.[8] In their Regulations, the respondents "have simply failed to speak with the small calibre precision required of regulations touching first amendment rights." *New Left Education Project* v. *Board of Regents of the University of Texas,* 326 F. Supp. 158, 164 (W.D. Tex. 1970), *prob. juris. noted,* 39 USLW 3375 (1971).

3. The Regulations afford college administrators unbridled discretion to prevent the exercise of First Amendment rights.

As the District Court found, the total effect of the regulatory arrangement with regard to demonstrations was to deter protected activity. The administrative scheme func-

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[8] It is interesting to note, as Judge Merhige pointed out, that the Regulations exclude from the definition of "demonstration"—and thus from the prohibition on indoor activities—any exhibition "commonly associated with social or athletic activities." Also, the evidence revealed that rooms are customarily reserved for certain types of meetings and the Regulations are deemed inapplicable. These formal and practical exceptions not only undercut any justification for the flat ban on indoor demonstrations, but call into question the evenhandedness of the Regulations. See *Tinker* v. *Des Moines Independent Community School District, supra* at 510-11.

tions as follows. First, "demonstration" is defined in substantially vague terms which explicitly exclude social or athletic gatherings. Thus at the outset the system is aimed at regulating expression with a political content. If a planned gathering could in any way be characterized as a "demonstration" then three subsequent rules are triggered. Notice must be given two days in advance, the demonstration cannot occur inside a building, and failure to disband such an unauthorized gathering is punishable by summary suspension in the discretion of a variety of campus officials.[9]

In First Amendment terms, the cumulative effect of this scheme is two-fold. First, it confers "virtually unbridled and absolute power" in school officials to prohibit any indoor demonstration, thus "subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority." *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969). Second, a prohibition on First Amendment activity which is cast in vague terms and which authorizes summary punishment for its breach will have the sure effect of deterring students from participating in constitutionally protected demonstrations. See *Corporation of Haverford College* v. *Reeher, supra.*

It is no answer to suggest, as did the Court of Appeals, that the availability of other means or forums of protest

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[9] The notice rule *per se* might not be objectionable if it required only notice, not approval, and if it did not prohibit spontaneous demonstrations. See *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968). But in the context of this regulating scheme, the requirement does much more. It allows school officials to designate an "appropriate area" and it affords them the opportunity to declare an indoor "demonstration" to be "not authorized."

can serve as a basis for inhibiting a particular mode of expression. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Jones* v. *Board of Regents of the University of Arizona,* 436 F.2d 618, 622 (9th Cir. 1970) (quoting from *Schneider* v. *State,* 308 U.S. 147, 163 (1939)). Moreover, freedom of expression contemplates the most effective communication possible, consistent with legitimate state interests. See *Davis* v. *Francois, supra; Wolin* v. *Port of New York Authority, supra.* The right to conduct a peaceful non-obstructive vigil inside a building cannot be infringed because there is a right to demonstrate outside. The First Amendment does not envision such bargains.

4. Petitioners' activities were constitutionally protected.

Perhaps the most telling indication of the vagueness and overbreadth of the Regulations is the fact that the petitioners' conduct was deemed to violate them. The District Court properly held that "the conduct of the students sought to be punished amounted only to protected expression." App., *infra,* p. 42a. The Court of Appeals disagreed, holding that the college could promulgate regulations to prohibit a peaceful vigil of this kind. This Court however, has made it clear that such activities "constitute methods of expression, entitled to First Amendment protection." *Shuttlesworth* v. *Birmingham, supra* at 152.

The method of expression contemplated and attempted here involved no intrusion on the rights of others, no inconvenience to competing academic needs, and no interference with classwork or administrative activities. As with the sit-in in a Louisiana library, the petitioners went

"in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where [they had] every right to be . . . " *Brown* v. *Louisiana, supra* at 141.[10] See also, *Davis* v. *Francois, supra.* And of course even in the high school setting this Court held that the First Amendment protected "the silent, passive expression of opinion, unaccompanied by any disorder or disturbance . . . [or] interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." *Tinker* v. *Des Moines Independent School District, supra* at 508. Indeed, even the Fourth Circuit in an earlier case recognized this principle. In *Saunders* v. *VPI, supra,* holding that a college could not penalize a student for participating in a "peaceful non-destructive demonstration," the court stated:

> A student's freedom to express peaceful dissent on campus is more than a privilege; *Tinker* tells us that it is a basic right guaranteed by the First Amendment. A state university is powerless to restrict or deny it as long as it is not obstructive or disruptive. 417 F.2d at 1130.

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[10] The Court of Appeals was wrong in reading *Brown* as "basically an equal protection case," App. *infra,* p. 14a. As the *Brown* opinion itself sharply noted: "[we] are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly and freedom to petition the Government for a redress of grievances." 383 U.S. at 141.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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September 29, 1971

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,391

LEWIS H. SWORD, *et al.*,

Appellees,

—versus—

JAMES W. FOX, *et al.*,

Appellants.

Appeal from the United States District Court for the Western District of Virginia at Harrisonburg. Robert R. Merhige, Jr., *District Judge.*

(Argued May 4, 1971 Decided July 1, 1971.)

Before:

BRYAN, BUTZNER and RUSSELL,

Circuit Judges.

WILLIAM G. BROADDUS, Assistant Attorney General of Virginia (Andrew P. Miller, Attorney General of Virginia, D. Patrick Lacy, Jr., Assistant Attorney General of Virginia, and James R. Sipe on brief), *for Appellants,* and

JOHN C. LOWE (Robert P. Dwoskin, and Lowe, Dwoskin and Gordon on brief), *for Appellees.*

RUSSELL, *Circuit Judge*:

This is a class action, brought on behalf of all the students at Madison College, for a declaratory judgment that certain regulations governing demonstrations at such college were constitutionally invalid as overbroad and vague and as impermissible restraints on freedom of speech and assembly. Madison College is a State-supported institution, located at Harrisonburg, Virginia, with a student body of approximately 4,000, mostly women.

The regulations under attack, which were adopted three years before the incidents involved here and which are included in the Student Handbook made available to all students on matriculation,[1] are concerned with student protests and demonstrations on the college campus. After setting forth a definition of demonstrations, the regulations require generally that any proposed demonstration "be registered with the Office of Student Activities 48 hours in advance". Other than this requirement of registration, the regulations impose no direct restrictions except the one specifically involved here, i.e., that "Demonstrations are forbidden in the areas of the Health Center, *inside any buildings* and congregating in the locations of fire hydrants". (Italics added) Thus, the president of the college stated without contradiction that, to his knowledge, the regulations had never been applied "to prohibit the desire of students to meet and demonstrate in areas of

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[1] These regulations are set forth in the opinion of the District Court as reported in 317 F. Supp. 1055, at pp. 1067-69.

the campus".[2] One of the witnesses called by the plaintiffs, a student who had engaged in the "sit-ins" involved in this action, testified that, while written application to register a demonstration was required, the registrant did not set forth thereon the purpose of the demonstration, only the time the demonstration was to begin and the areas where it was to be held; and that except for "making a few changes in some of the areas where the demonstration was to be held", "automatic approval" of the registration followed.[3] Thus the regulations, neither by their language nor by their application, are instruments for censoring or controlling the purpose or content of a demonstration.

The situation which generates this controversy began on Thursday evening, April 23, when a group of students organized a mass meeting of students to protest the termination of the services of certain teaching personnel at the college. Such protest meeting was duly registered in conformity with the college rules. After the meeting, however, a group of students determined to move on to Wilson Hall, a combination administration and classroom building, in which the office of the college president was located,

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[2] App., pp. 110 and 118.

[3] App., pp. 99-100. There is some discussion in the testimony about the different rules applicable to requisitioning a building for a meeting and registering a demonstration. A building or area is apparently requisitioned for what is deemed a normal college function. Application for this purpose is made to the Provost of the College. On the other hand, demonstrations as defined in the rules are registered with the Director of Student Activities. The students seemingly recognized the difference between the two proceedings. At any rate, there was no misunderstanding in connection with the two "sit-ins" involved here. The students sought to register them as demonstrations with the Director of Student Activities. App., p. 143.

and, as a part of their protest demonstration, to remain there overnight, engaging in "a sleep-in in front of the President's office". Some had brought sleeping bags; others sat or lounged about on benches or chairs. About an hour and a half afterwards, the Dean of Student Services came to the building, advised the group that they were violating the college regulations by a demonstration in Wilson Hall and warned them of the sanctions provided in the Student Handbook for demonstrations within a college building. Some of the students left; others remained until given a second warning about an hour later. On the next day, a group of students sought to register a "vigil" as they described it, to be held 48 hours later in Wilson Hall. The Dean of Student Services refused to register it because it would constitute "a demonstration inside a building" impermissible under the college regulations. Despite this denial, the students staged a "sit-in" on the night of April 26 in Wilson Hall. College officials came to the building on three occasions, requested the students to leave, and warned of the consequences should they fail to leave. After the first request to leave, some of the students departed but a substantial number remained. Other students joined the group in the building and a large number gathered in front of the building. There was singing and chanting, both from within the building and from the group that had gathered outside, but no violence or destruction of property. Finally, the police were called and a number of students engaged in the "sit-in" were arrested and charged with trespass under State law.[4] Disciplinary ac-

[4] A number of students, including the appellees, have been prosecuted under the State trespass statute because of their involvement in these demonstrations. They have already been tried and convicted in the State Courts and their convictions are on appeal.

tion was begun against some of the students involved in the "sit-in" and one, it seems was suspended and others were subjected to some type of disciplinary action. Three days later, the appellees and others had a demonstration on the campus to protest both the punishment of the appellees and the failure to continue the employment of certain members of the faculty. This subsequent demonstration was registered without any difficulty and there was no attempt by the college authorities to censor its content or to control or limit its purposes.

By this proceeding, the plaintiffs sought a declaratory judgment that the regulations proscribing their "sit-ins" in Wilson Hall were constitutionally invalid and for an injunction prohibiting the college from imposing any punishment on account of such "sit-ins". The District Court, on motion for summary judgment, granted the relief sought. We reverse.

It should be recalled at the outset, that, according to the uncontradicted testimony[5] of the college's president, the college, acting under these regulations, had never denied any student group the right to demonstrate nor were the students involved in the "sit-ins" with which this action is concerned ever denied the right to demonstrate in protest. As has been pointed out, these students actually

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Such appeals will turn on the validity of the very regulations challenged in this action. Whether under the recent decisions in *Younger* v. *Harris* (1971) 401 U.S. 37, and related cases, this Court should abstain in favor of the State Court and permit it to determine the validity or invalidity of the instant regulation in the criminal action was not raised by either party and, for that reason, we do not reach the question. Cf., *LeClair* v. *O'Neil* (3-Judge Court, Mass. 1969) 307 F. Supp. 621, 624, note 4.

[5] On appellees' motion for a temporary injunction, the District Court heard certain testimony. This testimony was incorporated into the record on the hearing of the motion for summary judgment.

did demonstrate, after registration of their demonstration, as required under these regulations, both before and after the "sit-ins" in Wilson Hall.[6] Nor was any attempt made to control or even influence the purpose of their demonstrations or, so far as the record shows, any other demonstrations on campus; indeed, the form of registration required to be filed with the Director of Student Activities, did not request information with reference to the demonstration's purpose.[7] What was denied these students—and all that was denied them—was the right to demonstrate by a "sit-in" *specifically in Wilson Hall.* It is thus not the *right* to protest but the *place* of protest that was regulated and is involved in this appeal.[8] The 48-hour registration requirement under the regulations, though referred to in the briefs filed by the parties, is similarly not in issue.[9] That regulation was not invoked against

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[6] This distinguishes this case from *Hammond* v. *South Carolina State College* (D.C.S.C. 1967) 272 F. Supp. 947, and *Jones* v. *Board of Regents of University of Arizona* (9th Cir., 1970) 436 F.2d 618, both of which dealt with an absolute bar on a demonstration or distribution of handbills. Both these cases, however, recognized that a college or university might constitutionally impose "reasonable rules regulating the time, place, and manner of the exercise of First Amendment rights" (page 620, 436 F.2d, 272 F. Supp. pp. 950-1).

[7] App., pp. 99-100.

[8] In the testimony of the Director of Student Services, he described the action taken thus:

> "Q. So you disapproved this registration or demonstration? A. I did not disapprove a demonstration. I disapproved the location of that particular demonstration and in fact a demonstration on the same topic by the same people was held about three days later for 36 hours outside and there was no problem. * * *" (App., p. 142)

[9] That such requirement, if applied to these demonstrations, would not have been invalid, see *Powe* v. *Miles* (2d Cir. 1968) 407

the appellees;[10] in fact, it seems to have been liberally enforced. The only portion of the challenged regulations under which the appellees were threatened with disciplinary action concerned, not the right generally to demonstrate nor the requirement of 48 hours' prior registration of a demonstration, but specifically the college's denial of the right to demonstrate within a college building, a building which housed the administrative offices of the college and certain classrooms. It is only that regulation so applied, that appellees have standing to challenge. See *United States* v. *Raines* (1960) 362 U.S. 17, 21-2, 80 S. Ct. 519, 4 L. Ed. 2d 524, and *LeClair* v. *O'Neil, supra* (pp. 624-5, 307 F. Supp.). To repeat, the basic question presented by the appeal is whether a State-supported college, while permitting generally and without discrimination demonstrations elsewhere on its campus, may, in consonance with the First Amendment, deny students the right to demonstrate and protest by way of a "sit-in" within a combination classroom and administrative building.[11]

F.2d 73, 84. A similar requirement was suggested as valid in *Wolin* v. *Port of New York Authority* (2d Cir. 1968) 392 F.2d 83, 94:

"* * * some guidelines are in order. In accommodating the interest of protesters and general public, the Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the rights of expression may be exercised."

[10] App., p. 111.

[11] Cf., *Cohen* v. *California*, —— U.S. ——, filed June 7, 1971 (pp. 4-5, slip opinion):

"In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where

Although it may be taken as settled that a college student, by his enrollment, is not stripped of his constitutional right to engage in "symbolic" speech in the form of demonstrations of protest,[12] this does not mean that the exercise of such right is absolute and unlimited.[13] While a flat ban on campus demonstrations would be manifestly invalid, "It is equally clear, however, that students do not have an unlimited right to demonstrate on university property. As in the case of other public facilities, a university may place reasonable restrictions on demonstrations to protect safety and property, maintain normal operations, facilitate campus traffic, and the like."[14] This accords with the general principle as expressed in *Food Employees* v. *Logan Plaza* (1968) 391 U.S. 308, 320, 88 S. Ct. 1601, 20 L. Ed. 2d 603:

Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina*, 372 U.S. 229, 236-237, and n. 11 (1963). Cf. *Adderly* v. *Florida*, 385 U.S. 39 (1966)."

[12] *Saunders* v. *Virginia Polytechnic Institute* (4th Cir. 1969) 417 F.2d 1127, 1130; *Dixon* v. *Alabama State Board of Education* (5th Cir. 1961) 294 F.2d 150, 156-7, cert. den. 368 U.S. 930, 82 S. Ct. 368, 7 L.Ed.2d 193; *Esteban* v. *Central Missouri State College* (8th Cir. 1969) 415 F.2d 1077, 1085; *Soglin* v. *Kauffman* (7th Cir. 1969) 418 F.2d 163, 165-6.

[13] *Esteban* v. *Central Missouri State College, supra* (pp. 1086-7, 415 F.2d).

See, also, *Cox* v. *Louisiana* (1965) 379 U.S. 559, 563, in which "the Court held valid on its face a statute forbidding picketing and parading near a courthouse. This was deemed a valid regulation of conduct rather than pure speech. The conduct reached by the statute was 'subject to regulation even though (it was) intertwined with expression and association.'" *Coates* v. *Cincinnati*, —— U.S. ——, filed June 1, 1971 (dissenting opinion of Justice White).

[14] *Developments in the Law of Academic Freedom*, 81 Har. L. Rev. 1045, 1131 (1968).

> "Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State."

In line with this principle, it has been often observed that, "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana* (1965) 379 U. S. 536, 554, 85 S. Ct. 453, 13 L. Ed. 2d 471; *Adderley* v. *Florida* (1966) 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149; and *Abernathy* v. *Conroy* (C.A.4, 1970) 429 F. 2d 1170, 1173-4.[15] It is clear from the foregoing that a college may adopt and enforce reasonable, non-discriminatory rules governing demonstrations on its campus.

In determining whether a college regulation restricting demonstrations is reasonable, the Courts must take into consideration both "the special characteristics of the school environment," [16] and that the regulation of student conduct is ordinarily the prerogative of the college authorities, with judicial intervention only when the circumstances are such as to "directly and sharply implicate

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[15] See, also, *Groppi* v. *Froehlich* (3-Judge Court, Wis., 1970) 311 F. Supp. 765, 770:

> "'Fair use' of the opportunity for public discussion and demonstration may not be denied. (Citing authorities) However, it has been consistently recognized that there are places in which and times at which speeches and meetings and demonstrations may be prohibited."

[16] *Tinker* v. *Des Moines School Dist.* (1969) 393 U.S. 503, 506, 89 S. Ct. 733, 21 L.Ed.2d 731; 55 Minn. L. Rev. 116, at pp. 127-8 (1970).

basic constitutional values."[17] For these reasons, the "precedents about the meaning of the first amendment in other areas of life can (not) be indiscriminately transferred to the university setting." Wright, *The Constitution on the Campus,* 22 Vanderbilt Law Rev. 1027, 1038. Specifically, the test for the reasonableness of college regulations is whether such regulations "measurably contribute(s) to the maintenance of order and decorum within the educational system",[18] are calculated to prevent interference with " 'the normal activities of the University' "[19] or obstruction to its function "to impart learning and to advance the boundaries of knowledge",[20] or are important in maintaining "order" and "normal operations".[21] In testing any college regulation for reasonableness under these criteria,[22] the Courts, it should be emphasized, are not concerned with "whether such rules are wise or ex-

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[17] *Epperson* v. *Arkansas* (1968) 393 U.S. 97, 104, 89 S. Ct. 266, 21 L.Ed.2d 228; *Barker* v. *Hardway* (D.C. W.Va. 1968) 283 F. Supp. 228, 235, aff. 399 F.2d 638, cert. den. 394 U.S. 905, 89 S. Ct. 1009, 22 L.Ed.2d 217; *Sill* v. *Pennsylvania State University* (D.C. Pa. 1970) 318 F. Supp. 608, 616. See, also, the cautionary statement in note, 48 N.C.L. Rev. 943 (1970):

> "But the courts have been extremely reluctant to scrutinize substantive rules that govern student behavior and more reluctant still to void such rules because of constitutional infirmity."

[18] *Burnside* v. *Byars* (5th Cir. 1966) 363 F.2d 744, 748.

[19] Wright, *supra* (at pp. 1041-2, 22 Vanderbilt Law Rev.).

[20] *Goldberg* v. *Regents of Univ. of California* (1967) 57 Cal. Reptr. 463, 472; 21 Syracuse L. Rev. 1260 (1970).

[21] 81 Har. L. Rev. 1048, 1131 (1968); cf., *Waugh* v. *Mississippi University* (1915) 237 U.S. 589, 35 S. Ct. 720, 59 L. Ed. 1131.

[22] A distinction must be made between what are designated as "ad hoc" rules (i.e., rules adopted to meet a present situation) and general rules. See *Burnside* v. *Byars, supra.* This distinction is recognized in the brief of appellees. (Page 2, Brief for Appellees.)

pedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities." *Burnside* v. *Byars, supra* (363 F. 2d at p. 748).[23]

The regulation involved here, which bans demonstrations in college buildings but not otherwise, tested by the criteria just stated, is reasonable. As has been observed, it does not purport to pass on the purpose of the demonstration. Nor has it been used to deny to students the right to protest on campus, provided only such protests are not carried on within a college building. Its purpose is manifest. College buildings are generally dedicated to classrooms, administrative offices, libraries, health centers, or dormitories. In all of these, order and study are expected. It can scarcely be argued that demonstrations in a classroom or administration building during day would not create a disruption in the educational activity of the institution and inconvenience its normal administrative operations.[24] At night, on the other hand, demonstrations

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[23] See, also, *Dickey* v. *Alabama State Board of Education* (D.C. Ala. 1967) 273 F. Supp. 613, 617-8:

> "This Court recognizes that the establishment of an educational program requires certain rules and regulations necessary for maintaining an orderly program and operating the institution in a manner conducive to learning. However, the school and school officials have always been bound by the requirement that the rules and regulations *must be reasonable*. Courts may only consider whether rules and regulations that are imposed by school authorities are a reasonable exercise of the power and discretion vested in those authorities. Regulations and rules which are necessary in maintaining order and discipline are always considered reasonable." (Italics in opinion.)

[24] See, Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. of Fla. L. Rev. 290, 300:

> "Indeed, the administrative inconvenience of having to accommodate ad hoc demonstrations in certain locations (for example, the president's office or inside a classroom building),

in such buildings offer too many opportunities for vandalism, and, in some instances, lawlessness. It is for this reason that demonstrations, even in the public streets, have been prohibited in the nighttime. *Abernathy* v. *Conroy, supra* (429 F. 2d at p. 1174); *Cottonreader* v. *Johnson* (D.C. Ala. 1966) 252 F. Supp. 492, 500. In dormitories, where students are entitled to the quiet necessary both for sleep and study, demonstrations, which, though not violent, are generally noisy, interfere with that decorum expected in the "normal operations" of the college. It is plain, therefore, that a regulation which prohibits demonstrations within the college buildings "measurably contribute(s) to the maintenance of order and decorum within the educational system" and represents "a reasonable exercise of the power and discretion" of the college authorities. *Grossner* v. *Trustees of Columbia University in City of N. Y.* (D.C.N.Y. 1968) 287 F. Supp. 535, 544-5, so held. This certainly should be the rule, when, as here, demonstrations, without any restriction of purpose, are permitted in other areas of the campus.

The appellees, as well as the District Court's opinion, assume that the reasonableness, and thus the validity, of the regulation, as applied to them, is to be determined by whether the particular demonstrations involved here were violent or peaceful and they contend that if their demonstrations were peaceful, even though violative of the regu-

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may justify a rule placing some facilities entirely off limits as a political forum, even though a given demonstration might itself not happen to be disruptive."

See, also, the comment in *Regulation of Demonstrations*, 80 Har. L. Rev. 1773, 1776-7 (1967):

"Similarly, the very presence of demonstrators in public buildings may upset normal operations."

lation, the regulation would be invalid as applied to them and their demonstration. Such argument is untenable.[25] The proposed demonstration in *Abernathy* v. *Conroy, supra* (429 F. 2d p. 1174), was, so far as the record indicated, to have been peaceful and this did not void the ordinance prohibiting night demonstrations. There was, as Justice Douglas pointed out in his dissent, "• • • no violence; no threat of violence; no attempted jail break; no storming of a prison; no plan or plot to do anything but protest" in *Adderley* v. *Florida, supra* (385 U. S. at p. 51), but this did not void a conviction under the state statute on trespass. The issue in this case, as has been already observed, is the reasonableness of the general regulation promulgated by the college and published in its Student Handbook. Just as the ordinance in *Abernathy* and the statute in *Adderley,* were measured for reasonableness, the reasonableness of the regulation involved here is to be resolved, not by the peculiar facts involved in these particular "sit-ins" that gave rise to this controversy—whether they were violent or not—but by the inquiry whether such regulation was reasonably connected generally with preventing interference with "the normal activities" of the institution. If the regulation was reasonable by this standard and thus within the power of the college, it is immaterial whether the appellees, in violating the regulation, were violent or peaceful. The rationale of this conclusion is well stated in *Bayless* v. *Martine* (5th Cir. 1970) 430 F. 2d 873, 879:

"When a general regulation such as that contained in Hill Hints had been made explicitly applicable to

[25] In advancing this argument, appellees fail to recognize the distinction between *ad hoc* and general rules previously promulgated. See note 22.

> the students here involved and they had been fully apprised of the penalty to be meted out for violation of the regulation not only by the Dean's direct statements to them but by the express provisions of the Student Discipline and Conduct Code, which was printed and distributed as a part of the Hill Hints handbook, then the University's right to discipline an erring student is not contingent upon the extent of disruption caused by his direct disobedience of the regulation."

The appellees urge, though, that public buildings, such as that involved here, may not be closed to demonstrators, that any regulation so closing them would be unreasonable, and they would deny the value of *Grossner* as a precedent. In support, they cite *Edwards* v. *South Carolina* (1963) 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697; *Brown* v. *Louisiana* (1966) 383 U. S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637, and *Wolin* v. *Port of New York Authority* (2d Cir. 1968) 392 F. 2d 83, cert. den. 393 U. S. 940. None of these authorities, it seems to us, supports the position of the appellees. *Edwards* involved the right to demonstrate on State House grounds, not in a building. *Brown* was basically an equal protection case, not a First Amendment case. The "prevailing opinion" [26] recognized that, "A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities" but held that it must do so "in a reasonable and undiscriminatory manner, equally applicable to all and administered with equality to

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[26] There were a number of opinions in this case. The opinion of Justice Fortas was described as the "prevailing opinion" in Justice Black's dissent (383 U.S. at p. 152, n. 1). It is of some significance that the minority in *Brown* became the majority in *Adderley*.

all. It may not do so as to some and not as to all. It may not provide certain facilities for whites and others for Negroes," specifically, "Negroes could not be denied access (to a public library) since white persons were welcome." (383 U. S. at pp. 139 and 143) It was the failure of equal and non-discriminatory treatment that invalidated the State action in that case. Moreover, some of those Justices who concurred in the result reached in the "prevailing opinion" did so on the ground that an essential element of the crime in the statute was intent to provoke a breach of the peace and that there was a complete absence of evidence of any such intent. (383 U. S. at pp. 161-2). In *Wolin* the issue concerned the right to distribute handbills in a building which really was used, in part, as a passageway or street for the commuting public of New York City. To a substantial extent, the building was similar to a public street through which daily hundreds of thousands of commuters passed.[27] Even here, where the structure might well be deemed, in part at least, a quasi-street, the Court recognized the right of the public authority, by proper regulation, to proscribe demonstrations or distribution of handbills in certain areas of the building, presumably the areas not used as a public passageway.

In summary, in our opinion, the regulation proscribing the use of college buildings for demonstrations, especially as applied to the particular building involved here, is a valid and reasonable exercise of the authority of the college to promulgate and enforce rules and regulations and does not represent an unreasonable limitation upon the

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[27] Cf. *Massachusetts Welfare Rights Organization* v. *Ott* (1st Cir. 1969) 421 F.2d 525, 527, n. 4:

"A welfare office is not to be equated with a public street."

First Amendment rights of the appellees and the class they represent.

In addition to assailing the regulation as invalid under the First Amendment, the appellees argue, and the District Court found, that the regulation was violative of due process because of vagueness and overbreadth. This claim focuses upon the specificity required in college rules and regulations. As the District Court remarked, there is a sharp divergence in the cases on this question[28] but all seem to agree that the same specificity is not required in college rules as is necessary in criminal statutes. *Jones* v. *Snead* (8th Cir. 1970) 431 F. 2d 1115, 1117, *Banks* v. *Board of Public Instruction of Dade County* (3-Judge Court, Fla., 1970) 314 F. Supp. 285, 290. The general rule on vagueness, as it has been developed in connection with the construction of criminal statutes, is that all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices". *United States* v. *Petrillo* (1947) 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877. Even measured by this standard, the regulation, in its definition of "demonstration", is sufficiently definite. Actually, "demonstration" itself is a fairly definite descriptive term. It had no added descriptive words in the ordinance involved in *Shuttlesworth* v. *Birmingham* (1969) 394 U. S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162, and, while the point was not adverted to in that decision, it seems unlikely the vulnerability of the term to a charge of vagueness, if valid, would have passed unchallenged in that

[28] Cf. *Whitfield* v. *Simpson* (3-Judge Court Ill., 1970) 312 F. Supp. 889, 896, and *Soglin* v. *Kauffman* (7th Cir. 1969) 418 F.2d 163, 168, on sufficiency of the term "misconduct" in a college regulation.

case. The appellees here apparently did not find the terms confusing or unclear. They sought to register their "vigil" or "sit-in"—whatever its proper description—as a demonstration under the college regulation. The language was "sufficiently definite" that they knew their planned activity came within the regulation's definition of "demonstration" and required registration. There can be no question that the appellees intended "a public manifestation of * * * protest * * * by a mass * * * occupation of premises." And, in their brief, the appellees concede that the definition of "demonstration" is "based on terms which are susceptible to common understanding". Despite this concession, the appellees press the point that the definition, taken in the context of all the related rules, becomes vague because it is "used in a strictly negative sense" and "for purposes either of limiting it or completely prohibiting such activity". The premise on which this argument rests is, in our judgment, unsound and contrary to the facts in this case. The regulations, as has already been emphasized, do not, and have not been applied, to prohibit all demonstrations on campus; they only ban those in college buildings. And, as so limited, we have held they are reasonable.

The District Court, also, thought the definition of "demonstration" in the regulation defective, too, because it exempted "social and athletic activities" from its definition. It occurs to us that the exemption was unnecessary. "Demonstration" connotes, in the context of this regulation, a public manifestation primarily of protest or condemnation. "Social and athletic activities" do not fit into this connotation, and, even though not expressly exempted, could be construed as outside the definition of the bare term "demonstration". Further, the exemption, even if

required, is warranted. It is to be assumed that all "social and athletic activities" have their own special regulations and are carried out under college supervision. Such is not true of demonstrations of the character covered by these regulations.

Finally, the District Court found the regulations overbroad. Applied to the specific building where the "sit-in" involved here took place, it is clear the regulation is not overbroad, whether applied during the day or night. For the reasons already given, we regard the application of the regulation as reasonable and within the proper authority of the college.

The decision of the District Court is accordingly reversed and the action is remanded with instruction to dismiss the complaint.

REVERSED AND REMANDED.

Order Denying Motion to Dismiss and Granting Motion for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

Civil Action No. 70-C-26-H

LEWIS H. SWORD, *et al.*

v.

JAMES W. FOX, *et al.*

In accordance with the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The motion of the defendants to dismiss the complaint be, and the same is hereby, denied.

2. The case may proceed as a class action under Fed. Rules Civ. Proc., Rule 23(a) and 23(b)(2), 28 U.S.C.

3. The plaintiffs' motion for summary judgment be, and the same is hereby, granted to the following effect:

a. The Court declares that the plaintiffs may not be subjected to discipline by the defendants for their participation in unregistered demonstrations in Wilson Hall at Madison College on the nights of April 23 or 26, nor

for their failure to disband such activities when directed to do so by a college official.

b. The Court declares that, of the Madison College "Regulations on Demonstrations and Peaceful Assembly," the operative definition of a "demonstration;" Rule 1; and Rule 4, to the extent that it forbids demonstrations inside any building, are facially unconstitutional, and that the penalty provision allowing the suspension of students who refuse to comply with an order to disband an unauthorized demonstration is invalid as applied.

4. This case be retained on the docket for consideration of such further requests for relief as may be made.

Let the Clerk send a copy of the memorandum and this order to all counsel of record.

ROBERT R. MERIGHE, JR.
United States District Judge

Date: September 28, 1970

Opinion of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

Civil Action No. 70-C-26-H

LEWIS H. SWORD, *et al.*,

—v.—

JAMES W. FOX, *et al.*

MEMORANDUM

This action calls into question the extent to which a public institution of higher education may constitutionally restrict and penalize the manifestation of dissent by its students. The issues arise in the context of an application for a declaratory adjudication as to the validity of current college regulations on their face and as to the legality of imposing sanctions on the participants in two campus demonstrations. The plaintiffs, all students at Madison College when suit was filed, have moved the Court for summary judgment in their favor. Madison is a State-run college in Harrisonburg, Virginia.

The defendants are the Dean of Student Services, James D. Fox; the college president, G. Tyler Miller; the Attor-

ney General of Virginia, Andrew P. Miller; an Assistant Attorney General of Virginia, Walter Ryland; and the Rector and two members of the Board of Visitors of the college.

The Court has heard evidence on the plaintiffs' motion for a preliminary injunction, including the testimony of two defendants, Fox and G. Tyler Miller. Also before the Court is the complaint, sworn to by the plaintiffs Rainey and Sword, certain exhibits admitted during the hearing, and an additional affidavit and exhibit filed in response to the plaintiffs' motion.

The Court may grant summary judgment for a party only if the materials on file indicate that there is no dispute as to material facts and one side is entitled to judgment as a matter of law. Fed. Rules Civ. Proc., Rule 56, 28 U.S.C. The successful movant must show, with materials of appropriate evidentiary quality, that every state of facts is excluded save that which entitles him to relief. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The same standard applies even when oral testimony has been taken. In this case the Court made findings on the basis of testimony adduced at the hearing on preliminary relief. Counsel for the defendants did not consent at that time that the matter be finally determined on the basis of that evidence. Whatever may be the use to which the testimony and fact findings from that hearing may later be put, see Fed. Rules Civ. Proc., Rule 65(a) (2), 28 U.S.C., at this point the only issue is whether, treating the testimony of each witness as if it were presented in affidavit form, a triable issue of fact exists. 6 Moore's Federal Practice, ¶ 56.11 [1.-8], at 2149 (2d ed. 1966).

For the purposes of this motion, the Court treats the complaint, sworn to by Sword and Rainey, as equivalent to an affidavit. In its consideration of the pleading, however, the Court is mindful that, as in its consideration of affidavits submitted on a Rule 56 motion, it may only consider those statements which the affiant would be permitted to put before the Court as testimonial evidence, and must disregard legal conclusions.

The plaintiffs sue on behalf of all Madison College students; on their side the case is a class action; Fed. Rules Civ. Proc., Rule 23(a), (b) (2), 28 U.S.C.

The suit, when first filed, sought injunctive relief from the further application of Rules 1 and 4 of the college's rules concerning demonstrations, and alleged that disciplinary proceedings against certain individual members of the plaintiff class for infractions of these rules had already commenced.

The full text of the Madison College "Regulations on Demonstrations and Peaceful Assembly" is appended to this opinion. These regulations were approved by President Miller and are included in the college handbook. In particular dispute here are the definition of the functions to which the rules pertain, Rules 1 and 4, and a rule requiring demonstrators to disband on order.

> A demonstration is considered to be a public manifestation of welcome, approval, protest or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)

1. The demonstration is to be registered with the Office of Student Activities 48 hours in advance.

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4. Demonstrations are forbidden in the areas of the Health Center, inside any buildings and congregating in the locations of fire hydrants. The appropriate areas for demonstrations will be determined at the time of the request.

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When an assembly of students not authorized by the Dean of Student Services, the Dean of Men, or the Deans of Women has been requested to disband by the President or by an officer of the Student Government Organization or Student Government Association, or by a dean or other administrative officer, those students refusing to comply will be subject to immediate suspension.

The plaintiffs' original complaint sought declaratory and injunctive relief against the enforcement of Rules 1 and 4. The Court, after a hearing on May 26, 1970, denied injunctive relief pendente lite, in part because irreparable harm did not then seem imminent and in part out of concern for the development of the college's independent quasi-judicial bodies.

Subsequently, the plaintiffs initiated further proceedings by their "motion for declaratory relief." Therein it is alleged that disciplinary hearings had been conducted by the defendants with the result that certain plaintiffs were barred from continuing their studies at Madison in September. The Court construes the pleading to be an abandonment of injunctive claims, without prejudice to their possible renewal.

Although it is not strictly necessary, on a motion for summary judgment, that findings of fact and conclusions of law be set forth, the Court believes that fairness to the parties requires that the uncontradicted facts and the legal standards which govern its ruling be expressed.

Certain Madison students were prompted, late in April, 1970, to express to the Madison community their dissent from the college's decision not to retain various teaching personnel; the details of their grievance are unimportant.

On Thursday, April 23rd, a meeting in the Blackwell Hall Auditorium and a gathering near Gibbons Hall were held, both of which activities, the parties agree, were conducted in conformity with college rules. Dennis Gregory, a student, registered the outdoor function with the Director of Student Services; the Blackwell Hall meeting space had been requisitioned in advance as well. The meeting was billed in advance as a "free university" or "teach-in" concerning broad issues of campus government.

After these functions a group of the participants decided to move on to Wilson Hall and assembled there at about 11:00 p.m., although prior arrangements for its use had not been made. According to the plaintiff Sword's testimony, about 25 persons were present. It was the group's intention to remain overnight in order to dramatize their concern and to meet with President Miller, whose office is in the building, the next morning. Two or three in the crowd had brought sleeping bags. The rest sat on benches in the lobby or, for lack of seats, sat on the floor. The passages were kept clear, and there was no boisterousness. Most sat and talked, and a few had brought something to read.

At 12:35 a.m. Friday morning, according to the sworn complaint of Sword and Rainey and consistent with Sword's testimony, the defendant Dean James Fox entered and

warned the group that they were conducting a demonstration contrary to regulations and would be subject to sanctions provided in the handbook regulations unless they left within fifteen minutes.

Dean Fox's testimony conformed to this account. He stated that he advised those present, adverting to the rules, that they were participating in an unregistered demonstration. The group reacted quietly. Dennis Gregory, according to Fox, stated that they were present as individuals and thought they had a right to be there.

Fox departed, and most of the group left soon after him. The dean returned at 1:15 a.m., according to Sword's account. As he approached Wilson for the second time some persons outdoors in the vicinity called to those within, warning them to come out. Sword was still inside. With him, he said, were seven or eight others. A dog may have been present as well.

Fox brought with him a tape recorder and was accompanied by an administration official who took photographs. The dean announced that a violation of regulations had occurred. Everyone listened courteously. A few minutes later the group left.

On Friday, April 24th, a number of students, including named plaintiffs, sought permission over 48 hours in advance to conduct a "vigil" in Wilson Hall. Dean Fox testified that when this request was referred to him by a member of his staff, he disapproved it and declined to register the function because it would constitute a "demonstration" inside a building, impermissible under Rule 4.

At 8:50 p.m. Sunday night, more than 48 hours after this registration attempt failed, a group of students, among whom was Sword, assembled again in the Wilson Hall lobby. As before, they planned to stay the night and speak

with President Miller the next morning about the administration's refusal to rehire certain professors; added to their list of grievances this time was the threat of sanctions against the participants in the vigil of three days before. About fifty persons were inside Wilson Hall, according to Sword, including three professors.

At 9:00 p. m., Sword and Rainey state in the sworn complaint, campus police began "securing" the building. They so advised the occupants and cautioned them that they had five minutes within which to leave. About 25 of the 50 left, and the police proceeded to lock all but a few of the doors.

Dean Fox arrived at 9:29 p.m., announced that an unauthorized demonstration was being held, and stated that students present would be subject to disciplinary action including suspension and nonstudents might be arrested. He gave them fifteen minutes to leave.

The group was courteous toward Fox. Some inquired why the building was being locked; he replied that it was on account of their presence. As before, some sat on the floor, but hallways were not blocked. The group was fairly quiet and peaceful. One professor advised everyone to be orderly. Sword passed out ashtrays, and someone else swept the floor. One person had brought a guitar; Sword had a flute, and about half the group joined in some folk songs.

Forty minutes after his first visit Fox returned and advised the group, which numbered 27, that they were then subject to suspension. Other administration officials accompanied him, taking names and photographs.

The group remained in Wilson. No property damage was done, and order was maintained. Over time the size of the crowd approximately doubled; Sword said he later learned that many entered by windows. A crowd of at least fifty

people assembled outside Wilson Hall, and at one point, for about ten seconds, some of those inside chanted "come on in."

Around midnight police arrived and arrested about thirty of those in Wilson Hall. The students made no resistance, and in fact swept the floor before leaving.

Disciplinary proceedings against several students for participation in one or both "unregistered demonstrations" and for refusing to leave on request were initiated by college authorities. The evidence does not fully show the outcome of these hearings, which were resumed by the college after the Court denied preliminary injunctive relief. In the record are minutes of a meeting of the Executive Committee of the Board of Visitors, which made it plain, however, that at least one student was suspended for his part in the two "vigils" and that some others, at least, were punished.

Wilson Hall had never before been locked; it was normally open day and night. It contains most of Madison's administrative offices, some classrooms, and an auditorium which holds at least 700 people. Gene S. Wagner, chief of the campus security force, testified that he had often seen students congregating and talking in Wilson Hall and never knew anyone to be excluded. After the arrests were made, late Sunday or early Monday, the chains were removed and the building was reopened.

Testimony at the hearing also covered the Madison College "common law" of student group functions, the principles which had developed in case-by-case applications.

Dean Fox stated that he regarded both the Thursday and Sunday sit-ins as "unregistered demonstrations," despite the fact that more than 48 hours' notice was given in the latter case. Rule 1 states that a demonstration is "to be

registered." Under the administration's interpretation, however, as the account of events should have made clear, "registration" involves not just notice but administration approval as well.

The rules are not always invoked when demonstrations stray from approved areas. On at least one recent occasion, Dean Fox testified, a protest march by 1300 students, which also concerned faculty hiring policy, departed from its registered zone; nevertheless no sanctions were imposed on organizers or participants. Fox said punishment would have been "ludicrous" because the originally designated space was far too small.

Certain organized student group functions are not subject to the notice and location requirements of the handbook rules. Only "demonstrations" as defined therein are covered, Fox testified. Although the definition itself includes the term "meeting," in practice it is not forbidden to student groups to requisition and make use of indoor locations for meetings. A member of Dean Fox's staff, the Director of Student Activities, generally settles the question of whether a given event is a "meeting" or a "demonstration," but if there is some question in her mind, Dean Fox resolves it. He stated that he had full discretion in the matter, within the guidelines of the regulations.

Under this practice prior consent must be secured for both "meetings," for which space is "requisitioned," and "demonstrations," which are "registered," but if it is the decision of the Director or Dean Fox that the proposal involves a "demonstration," Rule 4 establishes that it may not proceed indoors, and other restrictions of the rules apply.

President Miller testified that a "demonstration" is defined according to its purpose, as set out in the regula-

tions: "welcome, approval, protest, or condemnation." He also said that the notice and location rules were intended to be enforced, and that in the earlier instance of the march that strayed out of bounds, no complaint had been brought to his attention.

Tinker v. Des Moines Independent School District Committee, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), establishes that the guaranties of the first amendment, "applied in the light of the special characteristics of the school environment," *id.*, 506, 89 S.Ct. 736 extend to those attending public educational institutions. The Supreme Court overturned in that case the suspension of students who broke a rule forbidding the wearing of black armbands, symbols of protest, where the record showed no consequent disruption:

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 [69 S.Ct. 894, 93 L.Ed. 1131] (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Ameri-

> cans who grow up and live in this relatively permissive, often disputatious, society. *Id.*, 508-509, 89 S.Ct. 737.

Apprehension alone will not justify repression. This is far from saying, of course, that reasonable regulation of expression is forbidden. The usual factors of time, place, and manner may be the subject of neutral rules, so long as expression is not thereby unduly hampered.

> [The student] may express his opinions, even on controversial subjects * * *, if he does so "without materially and substantially interfering with appropriate discipline in the operation of the school" and without colliding with the rights of others. Burnside v. Byars [, 363 F.2d 744, 749 (5th Cir. 1966)]. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (C.A. 5th Cir. 1966), *Id.*, 513 [89 S.Ct. 740]. See also, Saunders v. Virginia Polytechnic Institute, 417 F.2d 1127, (4th Cir. 1969); Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968) cert. denied, 394 U.S. 905 [89 S.Ct. 1009, 22 L.Ed.2d 217] (1969).

The language of this leading case is broad, but it is sufficiently similar to that employed in decisions concerning the off-campus regulation of expression to enable the Court to draw on the wealth of precedents in that area. This will not always be appropriate, but where major sanctions are in issue, the analogies may be close indeed.

The plaintiffs urge two grounds for declaratory relief. First, they assert that their actions in Wilson Hall constituted protected expression, for which sanctions are barred. Saunders v. Virginia Polytechnic Institute, *supra*. Second, they contend, under the special standing rules applicable, Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), that whatever protection their acts might be due in the face of valid rules, the rules under which they stand charged are void and cannot thus be employed to punish their acts.

The defendants insist preliminarily that the plaintiffs ought to exhaust administrative remedies prior to seeking judicial relief. The claim has no merit. When a State college student seeks relief from administrative discipline, normally courts will not treat the issue until the punishment is final. Scoggin v. Lincoln University, 291 F.Supp. 161 (W.D.Mo.1968). The defendants contend that because all but two failed to appeal their cases to the Executive Committee of the Board of Visitors, the non-appealing students forfeited their right to judicial review.

It appears from the Executive Committee minutes that several students were punished by the Faculty Judiciary Committee and were notified that they might have their cases reviewed by the former body. The minutes indicate, however, that questions of punishment alone were considered. In any case the defendants do not assert that the penalties imposed on all are not now final. The regulations themselves give the Faculty Judiciary Committee appellate jurisdiction and do not mention further review.

The Court's power is not limited by the exhaustion doctrine. Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967). Absent the slightest evidence of intentional waiver or nonfinality, there is no reason to

apply it in these circumstances. This is doubly so because the plaintiffs now seek declaratory relief concerning the application of the rules in future instances; for this they are not required to "await the outcome of protracted litigation," Dombrowski v. Pfister, *supra,* 380 U.S. 487, 85 S.Ct. 1121.

The Court will proceed to consider the students' attacks on the facial validity of the rules.

First, the plaintiffs contend that the 48 hour registration requirement unduly suppresses spontaneous expression.

They claim as well that Rule 4, a wholesale bar on demonstrations inside any building, is, under any reasonable definition of the term "demonstration," over-broad.

The plaintiffs also urge that the regulation which enables the administration to impose immediate suspension on participants in "unauthorized" demonstrations when they fail to disband on request is invalid as well for overbreadth. When applied in conjunction with Rules 1 and 4, also attacked, and the definition of "demonstrations" embodied in the rules, it is charged that this provision authorizes summary, nonreviewable termination of protected activities.

These contentions necessarily imply an attack on the definition of a "demonstration", which triggers the regulations. Vagueness in this standard may vest excessive discretion in administrators. Before the fact, the students contend, it would empower them to forbid indoor events, perhaps substantially impairing the exercise of protected freedoms, without having to justify their rulings according to specific standards. *Cf.* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). After the fact, vagueness might lead to the abuse of labeling

those functions which met disapproval as "demonstrations," and therefore "unauthorized." *Cf.* Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).

Matter for threshold inquiry is whether regulations imposed by State college administrators are subject to the requirements of specificity and narrowness applied to criminal statutes of more general application. Divergent rulings are outstanding. Compare Soglin v. Kauffman, 295 F.Supp. 978 (W.D.Wis.1968), aff'd, 418 F.2d 163 (7th Cir. 1969), with Esteban v. Central Missouri State College, 290 F.Supp. 622 (W.D.Mo.1968), aff'd, 415 F.2d 1077 (8th Cir. 1969). Even the *Esteban* decision expresses agreement, however, with Hammond v. South Carolina State College, 272 F.Supp. 947 (D.S.C.1967), wherein a prior restraint rule was held unenforceable on its face, without investigation into the character of the conduct sought to be punished. In this case plaintiffs seek a declaration that the rules in force are void in addition to a ruling that their conduct may not be punished. Consistent with either *Esteban* or *Soglin,* the Court should entertain their vagueness and over-breadth challenges. Whether over-breadth, if established, is an effective defense against punishment for unprotected conduct is a separate issue.

On the first issue, the Court finds itself in agreement with Professor Wright, who views conventional vagueness standards as quite as worthwhile and not unjustifiably difficult to maintain on campus as well as off. Wright, The Constitution on Campus, 22 Vanderbilt L.Rev. 1027, 1060-1067 (1969). Indefinite rules always leave room for arbitrariness or favoritism in decision-making, whether the question be that of granting a permit or adjudicating the question of an infraction. Nor can the most exacting procedures be fully fair if the crime itself is insufficiently

defined. Moreover, rules which are over-broad, whether for vagueness or other reasons, have an *in terrorem* effect which by definition chills constitutional expression.

The faults of the Madison College rules are manifold. Demonstrations by means of mass gatherings, marches, and rallies are entitled to the protection of the first amendment. Shuttlesworth v. City of Birmingham, *supra;* Cox v. Louisiana, *supra;* Abernathy v. Conroy, 429 F.2d 1170 (4th Cir. 1970). To be sure, they are subject to more extensive regulation than those forms of expression which come less into conflict with others' legitimate interests. Cox v. Louisiana, *supra,* 379 U.S. 554-555, 85 S.Ct. 453. But insofar as the State seeks to regulate such activities it must not act in such a sweeping manner as needlessly stifles expression, nor vest the power to censor in its officials, Cox v. Louisiana, *supra,* 574, 85 S.Ct. 453. The Madison rules fall afoul of both these constitutional requirements.

Rules subjecting the exercise of first amendment activities to prior approval are inherently suspect. They are invalid if they permit those empowered to enforce them to deny permission upon criteria unrelated to proper regulation of the use of public places. However reasonable and equally enforced regulation of the time, place, manner and duration of forms of expression less pure than speech alone is permissible. Shuttlesworth v. City of Birmingham, *supra;* Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Likewise, criminal statutes not including the licensing feature are invalid for over-breadth if cast in vague terms so that they may be employed, in the enforcer's discretion, against protected activities. Brown v. Louisiana, 383 U.S.

131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (Opinion of Fortas, J.); Cox v. Louisiana, *supra*, 379 U.S. 551, 85 S.Ct. 453; Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963).

Here the vagueness of the definition of "demonstration" raises both of these problems. It calls into play the prior approval rule, to begin with. If the administrator, to whom application for registration is made, views the projected activity as a demonstration, he may ban its conduct indoors and determine the "appropriate areas" to be used outdoors—substantial restrictive powers flow from such a conclusion. Yet the prefatory definition of that which is subject to such limitation does not incorporate objective criteria such as number of participants, presence of sound amplifiers or musical instruments, or other factors which might, in various degrees, present a menace to others' property or tranquility. The phrase "a mass meeting, procession, picketing, or occupation of premises" embraces all group activities—what group does not occupy premises? —and more—one can picket alone and be a "demonstration" unless the adjective "mass" applies to all the nouns that follow. Yet the Court knows from the uncontradicted testimony that rooms may be requisitioned for some "meetings." Moreover, the regulations expressly exempt "exhibitions commonly associated with social or athletic activities." As the testimony revealed, what constitutes a regulated demonstration is determined by what the administrator construes to be its purpose.

A first objection to such a criterion of regulability is that it bears no relation to the "traffic control" standards which the State may impose on the right to assemble and express views. If it means anything at all, it is a flat regulation of content and therefore bad. Thomas v. Collins,

323 U.S. 516, 536, 65 S.Ct. 315, 89 L.Ed. 430 (1945). The factors which indicate purpose are, however, so elusive that in practical effect the administrators may "roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community." Shuttlesworth v. City of Birmingham, *supra*, 394 U.S. 153, 89 S.Ct. 935.

A further defect is the exemption granted to "athletic" or "social" functions. The latter, in particular, adds an additional element of vagueness to the description itself. More important, however, is that it reinforces the institution's position of non-neutrality as between opinions expressed. "[I]f a particular area is off-limits for a political demonstration it must be off-limits also for football pep rallies, art auctions, and other equally noisy or congested activities." Wright, *supra*, 1046.

The definition would render the regulations invalid even absent the licensing aspect. By rule, notice of a "demonstration" at least must be given and indoor activities are banned; noncompliance with Rules 1 and 4 brings on punishment. However, by reason of the ambiguous purpose-oriented definition referring in terms to any campus gathering, the regulations cast a pall of uncertainty even over meetings to which, on an authoritative construction, they might be inapplicable. It may be the intention of college authorities to enforce the regulations only when a gathering actually or foreseeably conflicts with the interests of others to carry on personal or educational pursuits, but their terms permit them to be invoked on a much lesser showing. Even if an indoor function has been authorized, in effect, by requisitioning a room, those who attend must

behave with circumspection, lest their conduct be regarded "approval" or "protest." Outdoor functions, for which no notice has been given, will be similarly constrained. "There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal * * *," Cox v. Louisiana, *supra,* 379 U.S. 574, 85 S.Ct. 486. Because the definition is so ambiguous, it necessarily deters the exercise of first amendment freedoms. Baggett v. Bullitt, 377 U.S. 360, 371-374, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); N.A.A.C.P. v. Button, 371 U.S. 415, 432-433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). As such it must be found invalid.

This is not to say that indoor or outdoor activities are not regulable by narrow rules which address themselves to factors unrelated to the content of the views expressed, and protect the legitimate interests of members of the college community in operating and making use of the educational facilities that the citizens of Virginia have furnished. Edwards v. South Carolina, *supra,* 372 U.S. 236, 83 S.Ct. 680; Abernathy v. Conroy, *supra.* These are substantial, valid interests which defendants have the unquestioned right and the duty to defend. However, the protective framework they erect must be one which does not by its very existence infringe upon students' right to engage in first amendment activities unhampered by fears of penalty under outstanding regulations.

The plaintiffs' complaint over the 48 hour notice regulation, Rule 1, has merit even when the rule is considered separately from the vague "demonstration" definition which triggers it, and apart also from the place limitations later discussed. The first amendment protects spontaneous as well as planned activities. No showing has been made that safety and police precautions can only be prepared

on two days' notice. Even assuming that the provisions of Rule 2 regarding "reasonable demonstration activities" and Rule 4 relating to determinations of "appropriate areas" for demonstrations do not empower administrators to reject an application or curtail activities with uncontrolled discretion, as *Shuttlesworth, supra,* forbids, there seems no reason why narrower rules prohibiting particular unprotected acts would not adequately forestall the untoward consequences of spontaneous gatherings. On its face the rule outlaws them entirely, and it is far from plain that it would be waived when advance planning is impossible. Compare Powe v. Miles, 407 F.2d 73, 84 (2d Cir. 1968). Rule 1 needlessly prohibits this category of protected activity. Wright, *supra,* 1044.

Likewise, the rule against indoor demonstrations of any kind is over-broad. No showing has been made that every building on campus houses such activities or facilities that the presence of even a limited number of persons whose presence is not otherwise required would tangibly disrupt legitimate functions.[1]

Cases outside the campus context have recognized that the exercise of first amendment rights on public premises may not be barred simply because individuals wish to use an indoor forum. Brown v. Louisiana, *supra;*

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[1] The defendants' memorandum suggests that if the Court does not conclude that the rule is reasonable and constitutional on any state of the facts, an opportunity should be granted the defendants to present evidence as to the reasonableness of the rules. The Court will not do so, for the time for presenting materials in opposition to the plaintiffs' motion has passed. The motion has been submitted for the Court's ruling, and the defendants have not shown by affidavit or otherwise reasons for which they cannot "present by affidavits facts sufficient to justify [their] opposition." Fed. Rules Civ. Proc. Rule 56(f), 28 U.S.C. No request for a continuance has been made. The Court shall rule on the motion on the uncontradicted facts before it.

Edwards v. South Carolina, *supra;* Davis v. Francois, 395 F.2d 730, 733 n. 4 (5th Cir. 1968); Wolin v. Port of New York Authority, 392 F.2d 83, 89 (2d Cir. 1968).

When such a blanket prohibition is imposed on demonstrations in the interior of any building, the duty falls upon the regulatory authority to show that a considered judgment has been made between the values of competing interests and uses, and that, due consideration having been given to lesser limitations, the State officials have been led to a belief, based on fact, that only a total ban can prevent disruptions of the institution's function. Cf. Scoville v. Board of Education of Joliet Township, 425 F.2d 10 (7th Cir. 1970); Wright, *supra,* 1045. No such showing has been made here. President Miller merely remarked that Rule 4 was intended to prevent "hysteria." It is a drastic cure indeed, especially in view of the fact that provocative discussion has long been shielded from punishment. Bachellar v. Maryland, 397 U.S. 564, 567, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). The asserted justification loses force, too, in the face of the exceptions Madison has carved out; athletic rallies and teach-ins are evidently considered not likely to lead to uncontrollable conduct.

The site of the protest here in issue, Wilson Hall, contains offices and a sizeable auditorium. While less busy than the facility involved in *Wolin, supra,* the Wilson lobby at times must sustain substantial traffic. As such, and as the administrative center of the college, the location both affords an audience to persuade and constitutes the usual locus of those in power to whom grievances are addressed. The punishment of silent protest in a library facility has been struck down by the Supreme Court, Brown v. Louisiana, *supra.* No showing has been made in this case that a

rule which bans even such conduct is compelled by the nature of each facility on the Madison campus. Perhaps certain locations might be the subject of specific regulation, as the health center already is. *Cf.* Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). However, a rule covering every building within the promulgating authority's jurisdiction appears not to be the product of a considered balancing between competing interests of expression and of office pursuits, study, and repose. Cf. Davis v. Francois, 395 F.2d 730 (5th Cir. 1968). The end is lawful, but the need for such sweeping means is not shown.

Fourth, the students contend that the disbanding order rule included in the penalty section of the regulations is unconstitutional in that it empowers a college official to impose sanctions based upon his sole judgment that a failure to register what he considers to be a "demonstration," apparent departure from the terms of authorization, or another official's refusal to authorize a function under existing rules, renders a given activity illegal.

The legitimacy of such a rule turns largely on the question of what issues will be considered open in subsequent judicial or quasi-judicial hearings. If the only matter to be decided (assuming there is a hearing at all) is compliance *vel non* with the order to disband, the regulation acts as an unconstitutional prior restraint, for the administrator's determination that conduct had wandered into unprotected areas is insulated from review. Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). However, if the question whether in fact grounds for a disbanding order, consistent with valid rules, existed may be contested at some time before the penalty is made final, the disbanding rule is a valid and probably beneficial warning device. Powe v.

Miles, *supra,* 407 F.2d 84-85; Cf. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 439, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957).

According to the only evidence before the Court as to the manner in which disciplinary hearings are conducted, the sole issue in dispute is compliance *vel non* with the order to disband. So enforced, the rule enables any named official to impose an instant cutoff on protected activities; it is consequently invalid. Hammond v. South Carolina State College, *supra.*

Having decided that the only regulations which the college apparently seeks to enforce against these plaintiffs are not consistent with the Constitution, the Court might well conclude that the nature of the plaintiffs' activities is therefore irrelevant to the question whether they may be punished. Some courts have so held. Soglin v. Kauffman, *supra,* 418 F.2d at 168; Hammond v. South Carolina State College, *supra,* 272 F.Supp. 950.

Whether the first amendment standing requirements are applicable on campus is an open question. One commentator has said that the doctrine exacts at times a high price for the protection of freedom of expression. Wright, *supra,* 1066-1067. It would seem, however, that the more serious cases of violent misconduct could at least be punished under conventional criminal statutes if college disciplinary rules fail.

The issue need not be decided now, however, for the uncontradicted facts show that the conduct of the students sought to be punished amounted only to protected expression. A peaceful manifestation of dissent or concern cannot be punished, under *Tinker, supra,* so long as it does not interrupt the educational process or conflict with the rights of others. Here on both occasions the students in Wilson

Hall displayed exemplary orderliness. They were courteous toward administration representatives and toward the police who appeared on Sunday night. They did not break into the premises; indeed the evidence is that they went to Wilson on Thursday partly because they knew it was left open night and day. Their principal purpose was to meet with President Miller in the morning, having waited overnight to dramatize their concern. Nothing in the file indicates that the students intended anything but a calm discussion with the president. No property damage occurred, and there is positive evidence to the effect that the occupants took pains to be neat. No one was excluded from entering the lobby or using it for access to other rooms.

In the absence of the slightest showing of inconvenience or reasonable expectation thereof to those with competing rights to use of the area, the plaintiffs' conduct cannot but be protected by the first amendment. Scoville v. Board of Education, *supra;* Saunders v. Virginia Polytechnic Institute, *supra;* Zanders v. Louisiana State Board of Education, 281 F.Supp. 747 (W.D.La. 1968). The record in this case is a far cry from the sort of conduct which courts have found to be good grounds for disciplinary action. Powe v. Miles, *supra;* Barker v. Hardway, *supra;* Marzette v. McPhee, 294 F.Supp. 562 (W.D.Wis. 1968); *Cf.* Scoggin v. Lincoln University, *supra.*

That the participants engaged in singing and, very briefly, chanting does not render their activity unprotected. No evidence indicates that the noise disturbed anyone, caused the crowd to become less controllable, or was in any respect incompatible with the time and place; as such it cannot be cause for punishment. Cox v. Louisiana, *supra,* 548; Edwards v. South Carolina, *supra,* 233. A different case might be presented if the crowd had made noise during

working hours, when lectures and office work go on. See Wolin v. Port of New York Authority, *supra,* 392 F.2d 83, 90 n. 8. Nor may the slight unrest among onlookers occasioned by the plaintiffs' acts serve as cause for discipline. Cox v. Louisiana, *supra,* 379 U.S. 551-552, 85 S.Ct. 453; Edwards v. South Carolina, *supra,* 372 U.S. 238, 83 S.Ct. 680; Terminiello v. City of Chicago, *supra.* Nor, further, did the plaintiffs subject themselves to sanctions when they calmly refused to comply with Dean Fox's orders to discontinue their protected activities. "[O]ne cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." Wright v. Georgia, 373 U.S. 284, 291-292, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349 (1963).

On the record as a whole there is no showing that the demonstration involved elements of conduct that the State might make criminal. Brown v. Louisiana, *supra* (opinion of Fortas, J.); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961). The plaintiffs are entitled to a declaration that they may not be punished for the demonstrations in Wilson Hall.

The defendants' motion to dismiss shall be denied. An order granting summary judgment shall enter.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: September 28, 1970

APPENDIX ANNEXED TO OPINION

Regulations on Demonstrations and Peaceful Assembly

Madison College seeks to preserve and to encourage the exercise of the rights of expression, conscience, affiliation, and peaceful assemblage. The College is equally mindful that a reasonable and lawful scheduling and assignment of College facilities, resources, and personnel consistent with the civil liberties expressed in the first amendment of the United States Constitution, are necessary in order to assure the pursuit of educational programs, to accommodate the needs of all persons, and to respect the rights of all members of the College Community.

The orderly conduct of classes is basic to the primary purpose of the College. Demonstration procedures are established to guarantee the continuation of this function and the continued health and safety of the members of the campus community. The College neither permits nor forbids demonstrations off campus by students or student organizations. The students or student organizations demonstrating off campus are reminded that they are expected to act in a manner that will conform to all national, state, and municipal laws and ordinances. The College is particularly concerned that this responsibility be fulfilled when students or student organizations demonstrating off campus identify themselves as students of Madison College.

A demonstration is considered to be a public manifestation of welcome, approval, protest, or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)

In order to achieve all purposes above, to provide regulations in the event of demonstrations on campus by students or student organizations, and to assure the administration of this policy consistent with all the purposes expressed above, the following procedures are established:

1. The demonstration is to be registered with the Office of Student Activities 48 hours in advance.
2. At the time of registration, the student is advised regarding reasonable demonstration activities.
3. Demonstrations are not to block traffic.
4. Demonstrations are forbidden in the areas of the Health Center, inside any buildings and congregating in the locations of fire hydrants. The appropriate areas for demonstrations will be determined at the time of the request.
5. The number of pickets may be limited by reasonable consideration of space in the proposed demonstration areas. Students are to be informed of this at the time of registration.
6. The right of expression is not to be confused with license to incite violence or to use indecent language, because these are beyond legal and reasonable espousal of any cause for which demonstrations are conducted.
7. If disturbance from observers begins to develop, the demonstrators are expected to refrain from altercations with observers.
8. Observers are expected to maintain a reasonable distance between themselves and the demonstrators at all times.

9. Observers may not obstruct legitimate demonstrations by physically blocking the path, by blocking other observers, throwing objects, or in any way acting to limit the right of free expression.

10. Both demonstrators and observers are expected to follow the directions of the Campus Police.

The Director of Student Activities shall submit to the Dean of Student Services a summary of the advice given the applicants for demonstrators, and inform the Chief of the Campus Security Force of the proposed demonstration.

The Dean of Student Services assigns one or more of the members of his staff to observe the demonstration. A complete report is made by the observing representative on the following day. This is kept on file.

In the event that an assembly appears to be a demonstration related to grievances, those present should be advised that orderly procedures for the hearing of grievances are available and must be adhered to. Such procedures include: the "open door" policy of the President of the College, the Provost and Assistant Provost of the College, the Business Manager, the Dean of Student Services, and his administrative staff, as well as the open meetings with students held monthly by the President and Administrative Council of the College. College officials will not negotiate with groups under conditions of duress, such as unauthorized occupation of College property.

PENALTIES

Students of the College are expected to conduct themselves as ladies and gentlemen both within the College and elsewhere. For student conduct which is outside the juris-

diction of the College but which tends to discredit or injure the College, the President is authorized by the Board of Visitors to impose such penalty as he may deem appropriate, including expulsion from the College. This responsibility is implemented by the Faculty Judiciary Committee, subject to review by the President.

Any student found guilty of participating in or inciting a riot or an unauthorized or disorderly assembly is subject to suspension.

When an assembly of students not authorized by the Dean of Student Services, the Dean of Men, or the Deans of Women has been requested to disband by the President or by an officer of the Student Government Organization or Student Government Association, or by a dean or other administrative officer, those students refusing to comply will be subject to immediate suspension.

Appeals

Any student or student organization convinced in good faith that arbitrary, unlawful, or unreasonable limitations have been imposed upon any demonstration or proposed demonstration, or any student or student organization subjected to disciplinary action under the provisions of this policy may appeal to the Faculty Judiciary Committee.

Judgment of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 15,391

LEWIS H. SWORD, *et al.*,

Appellees,

—v.—

JAMES W. FOX, *et al.*,

Appellants.

Appeal from the United States District Court for the Western District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and the case is remanded to the United States District Court for the Western District of Virginia, at Harrisonburg, with instruction to dismiss the complaint consistent with the opinion of this Court filed herein.

SAMUEL W. PHILLIPS
Clerk

A True Copy, Testo:
SAMUEL W. PHILLIPS, Clerk
By VIRGINIA LIPFORD
Deputy Clerk

FILED
JUL 1 1971
SAMUEL W. PHILLIPS
Clerk

Supreme Court, U.S.
FILED
OCT 30 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

October Term, 1971

~~No. 453~~ 71 - 453

LEWIS H. SWORD, ET AL.,
Petitioners,

v.

JAMES W. FOX, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1971

No. 453

LEWIS H. SWORD, ET AL.,

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondents, believing that the matters set forth herein will demonstrate the lack of substance in the questions sought to be reviewed by petitioners, file this brief in opposition and pray that this Court refuse to issue the writ of certiorari sought by petitioners because the opinion of the United States Court of Appeals for the Fourth Circuit does not merit review under any of the considerations contained in Rule 19 of the Rules of the Supreme Court of the United States.

PRIOR PROCEEDINGS

This case was initiated when the petitioners, students at Madison Coliege (hereinafter referred to as students), filed

a class action complaint against certain Madison College officials and others in the United States District Court for the Eastern District of Virginia challenging the constitutionality of rules 1 and 4 of the Madison College regulations governing demonstrations. The case was transferred to the Western District of Virginia, after which the Court ruled that the definition of demonstration as used in the regulations, rules 1 and 4, and a provision relating to disbanding were unconstitutional either facially or as applied.

The College officials appealed the District Court's judgment to the United States Court of Appeals for the Fourth Circuit. That Court reversed the judgment of the District Court and ordered the case remanded with instructions to dismiss.

The students now seek a writ of certiorari to review the judgment of the Court of Appeals.

QUESTIONS PRESENTED

1. Whether The Students May Properly Raise Issues At This Time Which They Did Not Raise Before The District Court And Which Are Irrelevant To The College Disciplinary Proceedings Involving The Students?

2. Whether The Court Of Appeals Applied The Correct Standard And Reached The Correct Result When It Determined That The Madison College Prohibition Against Demonstrating Inside Buildings Was Constitutional And Not Overly Broad?

3. Whether The Madison College Regulations Are Instruments For Censoring Or Controlling The Purpose Or Content Of A Demonstration?

4. Whether The Students' Conduct Was Constitutionally Protected And, If Not, Whether They Have Standing To Challenge The Madison College Regulations?

STATEMENT OF THE CASE

Madison College is a state supported institution of higher learning located in Harrisonburg, Virginia. The College has approximately 4,000 students, most of whom are women.

Prior to stating the facts giving rise to this case, it is first important that the Court understand the Madison College regulations which were the subject of the District Court's ruling and the manner in which those regulations are applied. In addition to rules 1 and 4 put in issue by the students, the District Court passed on two other parts of the College regulations. The regulations, including rules 1 and 4, which the District Court deemed pertinent are as follows:

> A demonstration is considered to be a public manifestation of welcome, approval, protest, or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)
>
> * * *
>
> Rule 1: The demonstration is to be registered with the Office of Student Activities 48 hours in advance.
>
> * * *
>
> Rule 4: Demonstrations are forbidden in the areas of the Health Center, inside any buildings and congregating in the locations of fire hydrants. The appropriate areas for demonstrations will be determined at the time of the request.
>
> * * *
>
> When an assembly of students not authorized by the Dean of Student Services, the Dean of Men or the Dean of Women has been requested to disband by the President or by an officer of the Student Government Organization or Student Government Association, or by a dean or other administrative officer, those students refusing to comply will be subject to immediate suspension.

That the District Court exceeded the scope of the pleadings when it ruled that the definition of demonstration and the disbanding requirement were either facially unconstitutional or unconstitutional as applied is made clear by the students' motion for summary judgment [1] in which they state:

> The only question in controversy is the constitutionality of Rules 1 and 4 of the Madison College Regulations on Demonstrations and Peaceful Assembly. . . .

If the student gathering is a meeting which does not fall within the definition of a demonstration, then College regulations permit students to use available building space. (P. App. 3a) [2] There is no evidence to suggest that the College ever attempted to regulate the content of First Amendment expression at such meetings.

If a student gathering falls within the definition of demonstration, then registration must be made with the Director of Student Activities who registers demonstrations. Uncontradicted testimony accepted by the Court of Appeals demonstrated that over the years the administrators have gained sufficient experience to determine whether the gathering is a meeting or a demonstration. (P. App. 3a) Not only do the students understand the differentiation, they have made no claim that they do not. Moreover, they unhesitatingly attempted to register the demonstration here in question pursuant to the regulations governing demonstrations.

As found by the Court of Appeals,

> One of the witnesses called by the plaintiffs, a student who had engaged in the "sit-ins" involved in this action,

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[1] Copies of the students' motion for declaratory relief and their motion for summary judgment upon which the District Court acted are appended to this brief as Appendix A and Appendix B respectively.

[2] P. App. as used in this brief will refer to the Appendix contained in petitioners' brief.

> testified that, while written application to register a demonstration was required, the registrant did not set forth thereon the purpose of the demonstration, only the time the demonstration was to begin and the areas where it was to be held; and that except for "making a few changes in some of the areas where the demonstration was to be held", "automatic approval" of the registration followed. [Footnote omitted.] Thus the regulations, neither by their language nor by their application, are instruments for censoring or controlling the purpose or content of a demonstration. (P. App. 3a)

The Court of Appeals further found that no attempt was made to control or even influence the purpose of the students' demonstration here in question, or, so far as the record shows, any other demonstrations on campus. (P. App. 6a)

During the hearing below, Dr. Miller, president of the College for nearly twenty years, explained the justification for rule 1 which requires registration of a demonstration:

> The 48 hour rule was established to provide opportunity to find an appropriate place and to obtain the necessary staff, if there were to be a large number of students desiring to demonstrate.

The 48 hour requirement was originally established because of some anticipation that there might be large groups demonstrating and the College would be required to place more personnel on notice to guard against disruptiveness. In practice, however, the 48 hour requirement of the rule is "not adhered to unless it [is] important to do so because of the size, potential size of the demonstration."

James Fox, Dean of Student Services, who is charged with enforcing these regulations, also made clear the College's position that the 48 hour requirement would be waived if necessary when he stated, "If the time was important, if the

time element was important we have waived the time element before." Dean Fox emphatically answered in the negative the District Court's question whether students would be denied the opportunity of welcoming the President of the United States should he appear on campus without 48 hours notice. While not deeming it necessary to rule on the 48 hour requirement, the Court of Appeals noted that the regulation was liberally applied. (P. App. 7a)

Dr. Miller also discussed rule 4 forbidding demonstrations inside buildings and explained that:

> The purpose of this rule was to protect the property and the rights of other members of the college community. This rule was approved by the Board of Visitors after careful consideration that it was necessary to have a rule to prevent demonstrations inside of buildings, because of the possible damages that could occur in mass hysteria . . . which could not only damage property but also might have serious interference with the rights of other people [using] a building.

The Court of Appeals accepted Dr. Miller's testimony, given without contradiction, that, to his knowledge, the regulations have never been applied "to prohibit the desire of students to meet and demonstrate in areas of the campus." (P. App. 2a) It is noteworthy that three days after the demonstration here in question the students demonstrated on campus to protest their pending disciplinary charges and the College's failure to continue the employment of certain members of the faculty. This subsequent demonstration was registered without any difficulty and there was no attempt by the College to censor its content or to control or limit its purposes. (P. App. 5a)

The factual incidents which gave rise to this case occurred during the end of April, 1970. On Thursday night a number of students gathered in a meeting to have a free university.

Later they held a demonstration to protest the non-reappointment of several faculty members. This demonstration had been registered and a certain area was designated for the students' use. After going to the designated area, the students marched to Wilson Hall where they decided to spend the night so that they might be present when Dr. Miller appeared at his office in the morning. Wilson Hall is the main administrative building at Madison College. It also contains classrooms and an auditorium. The students were told to disperse and there is some indication that they were threatened with disciplinary action if they failed to do so.

Apparently upset by the alleged threat of disciplinary action, the students decided to hold another demonstration. Following the procedures for demonstrations, the students attempted on Friday to register a demonstration in Wilson Hall to be held Sunday night. Dean Fox refused to accept the registration because the location of the demonstration would bring the participants in violation of rule 4. (P. App. 4a)

Despite the fact that the registration was not accepted, the students proceeded to attempt to hold the demonstration in Wilson Hall. The demonstration was defined as an all night sit-in by which the students were going to try to manifest their concern to Dr. Miller.

A crowd of approximately 100 to 150 persons gathered in front of the building. The students inside the building attempted to persuade the persons outside to come into the closed building. Some persons outside responded by climbing through windows and one climbed onto a porch roof and through a second floor window. At one point the students inside chanted to urge the students to enter the secured building. Several students had musical instruments and they sang songs to pass the time. There was "certainly a good bit of

noise at different times throughout the demonstration." The students were, however, nonviolent and caused no property damage.

At approximately 9:30 p.m. Dean Fox entered the building and warned the students to disperse and leave Wilson Hall or be subject to disciplinary action. When the students refused to cease violating the rules and after warning them another time of the consequences of their refusal, the college officials procured warrants for their arrests. By the time the police arrived to effectuate the arrests, the crowd inside the Wilson Hall lobby had swelled to 65 or 70 persons.

Several weeks later and after a hearing was held, many of the students were disciplined by the College for participation in the demonstration. The disciplinary action stemmed from holding the demonstration inside the building and not from the 48 hour portion of rule 1. (P. App. 7a) It was this disciplinary action which precipitated the filing of this case.

REASONS FOR DENYING THE WRIT

ARGUMENT I

The Students May Not Properly Raise Issues At This Time Which They Did Not Raise Before The District Court And Which Are Irrelevant To The College Disciplinary Proceedings Involving The Students.

The students who initiated this case sought from the District Court a declaration that rule 1 requiring registration 48 hours in advance and rule 4 prohibiting demonstrations inside any buildings were unconstitutional. At no place in their complaint, motion for declaratory relief or motion for summary judgment did the students request the District Court to declare the definition of the term demonstration as used in the Madison College regulations unconstitutionally vague. Indeed, before the Court of Appeals, the students

conceded that the definition of demonstration is "based on terms which are susceptible to common understanding." (P. App. 17a)

Nor did the students ask the District Court to rule on the constitutionality of the disbanding regulation authorizing immediate suspension. In their motion for summary judgment, the students clearly asserted that the "only question in controversy is the constitutionality of Rules 1 and 4. . . ."

Undoubtedly, the students' failure to attack the demonstration definition was caused by their ability to understand easily the meaning of that definition while their failure to attack the disbanding regulation which authorized immediate suspension stemmed from the fact that they were not immediately suspended and were not disciplined by the College until after a hearing had been held some weeks later.

Because the students did not properly raise those issues before the District Court, that Court erred when it considered those issues in formulating its opinion. *Armstrong Cork Co.* v. *Lyons*, 366 F.2d 206, 208 (8th Cir. 1966). The fact that the District Court's opinion is predicated upon its finding that the definition is unconstitutional compounds the error. (P. App. 37a) The students' failure to timely raise these issues precludes them from asserting them now. Rule 16 (1) (b), Rules of the Supreme Court of the United States.

Assuming, arguendo, that all issues were timely raised, however, the Court of Appeals properly held that the students had standing only to attack that rule under which they were threatened with disciplinary action, that is, the prohibition against demonstrating inside college buildings. (P. App. 7a) This precludes the students from attacking any portion of the regulations other than rule 4. The other portions of the regulations are simply not involved in this case.

To consider the other portions now would do violence to the well established rule to which this Court has rigidly ad-

hered, that is, a court should not anticipate a question of constitutional law in advance of the necessity of deciding it. *United States* v. *Raines,* 362 U.S. 17, 21 (1960); see *LeClair* v. *O'Neil,* 307 F. Supp. 621 (D. Mass. 1969, *aff'd,* ..... U.S. ....., 91 S. Ct. 1219 (1971). Also directly in point and supportive of the Court of Appeals' decision regarding standing is the case of *Bayless* v. *Martine,* 430 F.2d 873, 878 (5th Cir. 1970), where that court held that students did not have standing to complain of a 48 hour registration requirement when it had not been applied to them.

This Court's holding in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), does not give the students standing to attack regulations with which they are not threatened. The relevant portion of that case concerned standing to attack statutes under which prosecution is threatened in bad faith.

ARGUMENT II

The Court Of Appeals Applied The Correct Standard And Reached The Correct Result When It Determined That The Madison College Prohibition Against Demonstrating Inside Buildings Was Constitutional And Not Overly Broad.

In their petition, the students first assert that college regulations regarding expression must be tested by general First Amendment standards and that the District Court, in considering the Madison College regulations, adopted those standards while the Court of Appeals adopted different standards. The students further claim that the various Circuits are confused as to the applicable standards. In advancing these claims, the students are in error.[3] Courts may reach

[3] All of the cases the students cite on page 8 of their brief for the purpose of showing "confusion and disarray . . . among the Circuits" rely heavily on *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969), except *Brooks* which relies upon cases cited with approval in *Tinker.*

different results in applying the standard, but there is virtual unanimity among the courts over the applicable standard.

The District Court, properly relying on this Court's opinion in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), recognized that First Amendment guaranties must be "applied in the light of the special characteristics of the school environment. . . ." (P. App. 30a). The District Court also recognized that "reasonable and equally enforced regulation of the time, place, manner and duration of forms of expression less pure than speech alone is permissible." (P. App. 35a).

The Court of Appeals, in reversing the District Court, also applied the reasonableness test. (P. App. 10a) This approach was clearly approved in *Tinker,* 393 U.S. at 513, where this Court stated:

> The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.

Thus both courts applied the same standard, only differing in their result.

The Court of Appeals was of the opinion that the Madison College regulations governing demonstrations, a less protected mode of expression than that considered in *Tinker,* were reasonable. Madison College imposes no limitations on methods of expression involving "direct, primary First Amendment rights akin to 'pure speech.' " Students may wear armbands or buttons, conduct discussions or verbally express themselves on any subject without being subject to limitations. They may not, however, hold demonstrations inside college buildings.

That Madison College may distinguish between demonstrations and other more pure methods of expression is not subject to question. *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965). It is important to note that Madison College even permits demonstrations at any campus location out-of-doors with the limited exception of the health center area and the areas around fire hydrants.

The students complain that the prohibition against demonstrating inside buildings is overly broad. *Davis* v. *Francois*, 395 F.2d 730 (5th Cir. 1968), relied upon by the students, is easily distinguishable. That case concerned a statute imposing severe restrictions on picketing "on private property or on the streets and sidewalks of the City of Port Allen." *Davis* does not concern a prohibition against demonstrations inside buildings as the quotation which the students have included in their petition, out of context, would lead one to believe.[4] Madison College permits picketing on its campus sidewalks, streets and grounds with certain narrow exceptions.

Wolin v. *Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1968), *cert. denied* 393 U.S. 940, relied upon by the students, concerned the right to distribute handbills in a portion of a building which was actually used as a street. There is nothing to suggest that Madison College would limit the distribution of handbills in any portion of any building to which the public has access. Therefore *Wolin* is also distinguishable.

Edwards v. *South Carolina*, 372 U.S. 229 (1963), another case which the students claim for support, involves demonstrations on the capitol grounds of South Carolina. Madison

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[4] Two of the three judges in *Davis* v. *Francois* joined in ruling that a peaceful student demonstration was not protected expression in *Bayless* v. *Martine*, 430 F. 2d 873 (5th Cir. 1970). The third judge on the *Davis* panel did not sit on the *Bayless* panel.

College allows demonstrations on nearly all of its campus grounds. *Edwards* is therefore of no aid to the students.

The final case relied upon by the students is *Brown* v. *Louisiana*, 383 U.S. 131 (1966). The prevailing opinion there holds that there was insufficient evidence to sustain the convictions for breach of the peace. There is also *dicta* concerning equal protection of the law and freedom of expression. As noted by the Court of Appeals in the instant case, the minority in *Brown* became the majority in *Adderley* v. *Florida*, 385 U.S. 39 (1966), where this Court upheld the trespass convictions of protesters who were peacefully demonstrating on the jail house grounds.

While the students' claim of overbreadth is bankrupt of judicial support, the Court of Appeals' finding that the Madison College prohibition against demonstrations inside buildings is constitutional is supported by a wealth of authority. *Bayless* v. *Martine*, *supra*, which upheld a college regulation limiting demonstrations to a narrow area of the campus, supports the Court of Appeals' finding as does *Abernathy* v. *Conroy*, 429 F.2d 1170 (4th Cir. 1970), which held constitutional a statute prohibiting night parades. In *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535, 552 (S.D.N.Y. 1968), that court held "there is no question as to the reasonableness of" a regulation prohibiting all demonstrations within any university buildings and thereby upheld a regulation similar to the one in question.

This Court has upheld certain prohibitions of various modes of First Amendment expression in locations which are open to the general public. *Cameron* v. *Johnson*, 390 U.S. 611 (1968). Certainly the Court of Appeals' well reasoned opinion which is amply documented with authority demonstrates the necessity of upholding Madison College's limited prohibition of one mode of First Amendment expression.

The regulations of Madison College do not even suggest that the College is seeking to prevent First Amendment conduct completely, as the students suggest. As stated before, Madison College permits demonstrations at all out-of-doors locations with certain narrow exceptions and permits a wide range of various methods of First Amendment expression inside buildings.

Indeed, three days after the demonstration in question, the students properly registered and held a demonstration protesting the same grievances. (P. App. 5a) Clearly this regulation is an appropriate method of protecting the College, its property and student body from the disruptions which are attendant to even the most orderly demonstrations. See *Esteban* v. *Central Mo. State College*, 415 F.2d 1077, 1089 (8th Cir. 1969); *Evers* v. *Birdsong*, 287 F. Supp. 900, 905 (S.D. Miss. W.D. 1968)

ARGUMENT III

The Madison College Regulations, Neither By Their Language Nor By Their Application, Are Instruments For Censoring Or Controlling The Purpose Or Content Of A Demonstration.

The students' claim that the regulations afford Madison officials unbridled discretion to prevent the exercise of First Amendment rights is without merit. The definition of the term demonstration as used in the regulations is not vague, for, as the student conceded before the Court of Appeals, the definition is "based on terms which are susceptible to common understanding." (P. App. 17a) The students attempted to register their protest as a demonstration and there is no contention that they did not understand the procedures which they plainly followed. (P. App. 3a)

Contrary to the claims which the students are now advancing, the regulations do not involve the prior restraint

of a license without narrow, objective and definite standards. Uncontradicted testimony given by one of the students in the hearing below clearly shows that the College does not require the registrant of a demonstration to advise the College of the purpose of the demonstration. Moreover, once registration has been made, "automatic approval" of the registration follows. (P. App. 3a) As the Court of Appeals properly found,

> the regulations, neither by their language nor by their application, are instruments for censoring or controlling the purpose or content of a demonstration. (P. App. 3a)

The students' reference to the summary punishment provision is not only improper because it was not raised below, it is also inaccurate. In practice there can be no summary discipline since the regulations authorize an appeal from any disciplinary action. (P. App. 48a) And, significantly, that provision is not involved in this case.

The students' last contention in this portion of their brief is that the Court of Appeals should have considered the regulations in a vacuum, ignoring the fact that other locations are afforded for demonstrations and that other methods of expressions are permitted inside buildings. Such an approach would be unworthy of a judicial body. *Cf. Abernathy* v. *Conroy, supra.* Here the court recognized the need for allowing the students some means of meaningful expression. Finding that meaningful expression was afforded to the students, the Court was free to consider the reasonableness of this limited regulation. The approach advocated by the students is squarely inconsistent with *Adderley* v. *Florida, supra,* while that adopted by the Court of Appeals is consistent with the approach authorized by this Court.

ARGUMENT IV

The Students' Conduct Was Not Constitutionally Protected And They Have No Standing To Challenge The Madison College Regulations.

The students' final contention is that their activities were constitutionally protected. Their suggestion, carried to its reasonable conclusion, is that whenever demonstrators can wrap themselves in the cloak of non-violence they are immune to disciplinary action or criminal prosecution.

This Court has clearly rejected such notions. As the Court of Appeals pointed out, the non-violent nature of the demonstration in *Adderley, supra,* did not save those participants from prosecution. Nor did the peaceful nature of the parade in *Abernathy, supra,* or the peaceful nature of the student demonstration in *Bayless, supra,* save those participants from convictions or disciplinary action.

Tinker, supra, does not help the students here, for that decision clearly stated that it was concerned with "direct, primary First Amendment rights akin to 'pure speech,' " and not with "aggressive, disruptive action or even group demonstrations." 393 U.S. at 508. Thus it is clear that the non-violent nature of conduct is irrelevant when that conduct violates constitutional regulations. (P. App. 13a)

The students suggest that even should the Court find their conduct non-protected they have standing to challenge the Madison regulations. *Cameron* v. *Johnson, supra,* is dispositive of this issue as well as their claim that their conduct was protected. There an anti-picket law was attacked by a group of demonstrators who were threatened with prosecution under the law. In that case "the picketing was, by all accounts, peaceful and without incident. The pickets at first sang, chanted, preached and prayed. . . . There is no evidence that access to the Courthouse was actually obstructed. . . . The

pickets confined themselves to the line of march designated by the police themselves, and they were quiet and orderly." 390 U.S. at 624-625 (Fortas dissenting)

Nevertheless, the *Cameron* Court upheld the law. Distinguishing *Dombrowski* v. *Pfister, supra,* the Court first found that the law was not vague. The Madison College regulations are not vague and the students have even conceded that before the Court of Appeals. The *Cameron* Court next found that the statute was not overly broad because the conduct which it prohibited was subject to regulation so as to vindicate important interests of society. The Madison College regulations are not overly broad because a prohibition against demonstrating inside buildings is similarly necessary to vindicate important interests of society. This Court further distinguished *Dombrowski, supra,* relied on by the *Cameron* appellants and by the students here because those appellants were unable to show that the State was proceeding against them in bad faith, a showing which is necessary to trigger the standing exceptions carved out in *Dombrowski.* There is no suggestion that the Madison College officials were motivated by bad faith and the students do not claim so.

Dombrowski is also distinguishable because even assuming the Madison College regulation is vague or overly broad, it was not applied in such a manner to the students in this particular case, as the Court of Appeals so found. *Younger* v. *Harris,* ..... U.S. ....., 91 S. Ct. 746, 752 (1971).

CONCLUSION

Madison College seeks only to prohibit one conduct-oriented method of First Amendment expression in limited circumstances, that is, it prohibits demonstrations inside buildings. It allows virtually without limitation the same method to be used out-of-doors. Madison College also allows

students to avail themselves of the more pure forms of First Amendment expression inside buildings. The prohibition against demonstrating inside buildings is reasonable. It is not vague nor is it overly broad.

The students have no standing to attack other portions of the regulations as those portions were not applied to the students or the students failed to raise them in a timely fashion.

The decision of the Court of Appeals is consistent with both the decisions of this Court and the decisions rendered in other Circuits. Moreover, it is plainly correct.

Accordingly, respondents pray that this Court refuse to issue the writ of certiorari sought by the students.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing brief were mailed to Melvin L. Wulf, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010 this 1st day of November, 1971.

ANDREW P. MILLER

APPENDIX

APPENDIX A

MOTION FOR DECLARATORY RELIEF

Pursuant to the the decree entered by this court on 26 May, 1970 in the above styled matter the petitioners respectfully request this court to reinstate this matter on the docket and grant to them the declaratory relief requested for the following reasons:

1. Rules 1 and 4 of the Madison College Student Handbook Regulations on Demonstrations and Peaceful Assembly are violative of the First and Fourteenth Amendments to the Constitution of the United States as being overbroad in their scope as to inhibit and prevent the valid exercise of protected rights of expression and assembly.

2. Rules 1 and 4 of the Madison College Student Handbook Regulations on Demonstrations and Peaceful Assembly make no differentiation between peaceful and non-peaceful demonstrations. Lacking such a standard these rules give to the administration of Madison College an unlimited power to contravene the protected constitutional rights of the students of Madison College.

3. Under the circumstances of the events of April 26, 1970 which constituted a peaceful assembly of students in an open building, to which all students had unlimited access at all times, the application of the Rules 1 and 4 against these students constitutes an attempt by the respondents to suppress the rights of the petitioners and all others similarly situated to freedom of expression and assembly.

4. Petitioners adopt, for the purpose of this motion, the pleading and transcript of the hearing of May 21, 1970 in the above styled matter, requesting, however, the right to present such relevant additional and new evidence as might be necessary.

5. After the temporary restraining order of May 13, 1970 was dissolved by order of this court on May 26, 1970 Respondents, or some of them, proceeded to take disciplinary action against petitioners for violation of Madison College Handbook Rules 1 and 4 and suspended or reprimanded them, or denied them the privilege of attending graduation ceremonies of Madison College; many of the petitioners are now forbidden to return to Madison College in September.

WHEREFORE, the petitioners respectfully pray for the following relief:

a. That this court grant an early hearing on this matter as the petitioners are presently suspended from Madison College as a result of the disciplinary hearings which were completed following the dissolution of the temporary restraining order;

b. That this court declare Rules 1 and 4 of the Madison College Student Handbook Regulations on Demonstrations and Peaceful Assembly as violative of the First and Fourteenth Amendments to the Constitution of the United States, either on their face or as applied to the petitioner;

c. That this court further declare that the college disciplinary hearings that were predicated on violations of Rules 1 and 4 were illegal and void;

d. That if in the future the officials of Madison College and the Commonwealth of Virginia do not reverse and terminate all action against the petitioners now presently pending, this court, in aid of its jurisdiction and the effective enforcement of its decrees, enjoin the continuance of any actions against the petitioners;

e. That this court grant to the petitioners costs of court and reasonable attorneys' fees; and,

f. That this court grant to the petitioners any other relief which they be entitled.

LEWIS SWORD, et al.
By Counsel

APPENDIX B

MOTION FOR SUMMARY JUDGMENT

Pursuant to rule 56(a) of the Federal Rules of Civil Procedure your Petitioners move this court to grant them summary judgment in the above styled matter and put forward the following allegations and reasons in support of said motion:

1. As a result of the pleadings and memoranda filed by both parties and evidence adduced at a hearing held in this matter in the United States District Court for the Eastern District of Virginia in Richmond on 26 May, 1970, there is not any controversy between the parties as to any factual questions so pleaded.

2. The only question in controversy is the constitutionality of Rules 1 and 4 of the Madison College Regulations on Demonstrations and Peaceful Assembly; and at the 26 May hearing the constitutionality of said rules was made an issue in this matter.

3. On the basis of the evidence taken at the 26 May hearing and from memoranda already filed with this court (which will be supported by additional memoranda) Rules 1 and 4, supra, are unconstitutional both on their face and as applied to petitioners, in that said rules are violative of the petitioners' rights of freedom of expression and assembly protected by the First and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, on the basis of the foregoing, petitioners respectfully request this court to grant to them an early hearing on this motion and as a result of said hearing to render them full judgment with all relief previously prayed for, together with costs of court and reasonable attorneys' fees.

LEWIS SWORD, et al.
By Counsel